

مبادئ الفقه الإسلامي (الموسم)

Mohammad Hashim Kamali

PRINCIPLES
of ISLAMIC
JURISPRUDENCE

Third Revised and Enlarged Edition

ABOUT THE AUTHOR

Dr. Mohammad Hashim Kamali is currently Professor of Law at the International Islamic University of Malaysia, where he has been teaching Islamic law and jurisprudence since 1985. Born in Afghanistan in 1944, he studied law at Kabul University where he was later appointed Assistant Professor. Following this he worked as Public Attorney with the Ministry of Justice in Afghanistan. He completed his LL.M. and his doctoral studies at London University, where he specialised in Islamic law and Middle Eastern Studies. Dr. Kamali then held the post of Assistant Professor at the Institute of Islamic Studies at McGill University in Montreal, and later worked as Research Associate with the Social Science and Humanities Research Council of Canada. He is the author of *Law in Afghanistan, A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: E.J. Brill, 1985); *Freedom of Expression in Islam* (Kuala Lumpur: Berita Publishing, 1994; new edition, The Islamic Texts Society, 1997); *Punishment in Islamic Law: An Enquiry into the Hudūd Bill of Kelantan* (Kuala Lumpur: Institute for Policy Research, 1995); *Istishan (Juristic Preference) and its Application to Contemporary Issues* (Jeddah: Islamic Research and Training Institute, Eminent Scholars Lecture Series No. 20, 1997); *Islamic Commercial Law: An Analysis of Futures and Options, The Dignity of Man: An Islamic Perspective and Freedom, Equality and Justice in Islam* (all published by The Islamic Texts Society, Cambridge) and numerous articles in reputable international journals. He is twice recipient of the Ismā'īl al-Faruqī Award for Academic Excellence in 1995 and 1997.

Foreword

Uṣūl al-fiqh has always occupied a prominent place in the teaching curricula of Islamic institutions of legal learning. As a discipline of *Shari'ah*, *uṣūl al-fiqh* embodies the study of the sources of Islamic law and the methodology for its development. But even beyond its specific frame of reference one might say that *uṣūl al-fiqh* provides a set of criteria for the correct evaluation and understanding of almost any branch of Islamic learning. The teaching programmes of Islamic law that are conducted in English are in many ways hampered by a shortage of adequate reading materials in this language, and this is particularly the case with regard to *uṣūl al-fiqh*. The need for a comprehensive text on *uṣūl al-fiqh* has long been felt by students and readers in this University. Professor Kamali's contribution is therefore well received and appreciated by all those who are concerned with studying or teaching *uṣūl al-fiqh*. Since the initial publication of this book in 1989 in Kuala Lumpur, it has already become a well-acknowledged and widely read work of reference on the subject. The style of Professor Kamali's writing is refreshingly unconventional and yet his work remains well-founded and in close contact with the Arabic sources of his discipline. The author's personal experience of training in both Islamic and modern legal disciplines is reflected in his work, as he makes frequent comparisons with the concepts and principles of Western jurisprudence.

I take this opportunity to express my appreciation of Professor Kamali's valuable contribution. I also welcome the decision of the Islamic Texts Society of Cambridge, U.K., to bring out a new and more refined edition of this book. Students and readers of Islamic jurisprudence in English-speaking institutions of higher learning who do not read Arabic will find this book a significant contribution in the depth and detail of information it provides, reflecting both the content and the spirit of the Arabic sources of its origin. In his

Preface, the author himself has explained the approach he has taken in writing this book, and he comments on how the existing literature on *uṣūl al-fiqh* in English tends to be generic and therefore insufficient for the purposes of undertaking a full course of study in the subject.

I wish Professor Mohammad Hashim Kamali great success in his continued efforts to write and add to our fund of knowledge and understanding.

Prof. Tan Sri Datuk Ahmad Ibrahim
Dean/Shaiikh
Kulliyyah of Laws
International Islamic University,
Malaysia



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Preface to the Third Edition

Following the initial publication of this work by Pelanduk Publications of Kuala Lumpur in 1989, a revised edition was published in 1991 by The Islamic Texts Society, Cambridge, U.K., for distribution in Europe and North America. The book has, as a result, been widely distributed, and many reputable universities and academic institutions that specialise in Islamic disciplines have selected it as a required text in their courses and teaching programmes. Several distinguished scholars have, in the meantime, reviewed both the Kuala Lumpur and the Cambridge editions, and have made encouraging and useful observations. I take this opportunity to thank them for their interest and their valuable suggestions, many of which I have taken into consideration in the preparation of the present edition. I shall presently refer to some of their comments but, before I do so, I shall briefly explain the nature of the revision I undertook for this edition.

One of the more visible changes that the reader will notice in this edition, and one which will prove useful for students and teachers alike, is the appearance of Qur’anic *āyāt* both in Arabic and in English translation. In the first two editions, I included the Arabic versions of *hadith*, but not of Qur’anic passages for the obvious reason that the standard text of the Qur’ān is more easily accessible without variation, and this is not the case with *hadith*. Finding a particular *hadith* in the various collections can be difficult and time-consuming, and the wording of *hadith* may also differ in different collections. But then my experience of using this text in my own teaching showed that it would be very convenient to have the Arabic text of both the Qur’ān and *hadith* readily at hand.

The revision that I have undertaken for the present edition consists mainly of enhancing the original text by the addition of relevant information in different places throughout the book. The original text remains virtually unchanged but the reader will find frequent

additions in almost every chapter, plus a new chapter at the very end, entitled 'A New Scheme for *Uṣūl al-Fiqh*', and a Conclusion. The work has, as a result, been generally upgraded and is hopefully more responsive to the needs of advanced students of *uṣūl al-fiqh*. But even so, I hasten to add that *uṣūl al-fiqh* is a vast discipline and any attempt to treat the entire field in a single book is bound to have its drawbacks. I have confined my additions to the minimum of what could reasonably be accommodated within the framework of the original text. But the reader can still expect to find interesting additions to the chapters on the Qur'ān, the *Sunnah*, abrogation (*naskh*), commands and prohibitions, the rules of interpretation, *qiyās*, *istihsān* and the *ḥukm shar'ī*.

As mentioned above, several distinguished scholars have reviewed the book since its initial publication in Kuala Lumpur and in Cambridge. Most of the reviewers' comments were positive and appreciative of the style of my presentation in writing a book that was not burdened with excessive detail and yet is substantial enough to appeal to the discerning reader of Islamic law. I was happy to have been congratulated for having been remarkably successful in my presentation of the subject-matter of *uṣūl al-fiqh* in the manner and style that one would expect to find in its recognised Arabic sources. The reviewers' comments also noted that the book was rich in providing frequent illustrations from the Qur'ān and *Sunnah* in almost every part, something which students and non-specialist readers will find particularly useful.

However, one of my distinguished reviewers questioned my decision to place a chapter on *ijtihād* at the very end of the book. I should have explained for the benefit of those who do not read Arabic that this is not an unusual feature of Arabic textbooks on *uṣūl al-fiqh*. The reason for this is perhaps rather symbolic of the message that *ijtihād* is the end-result of *uṣūl al-fiqh*, and the ability to conduct it is the sum-total of the knowledge and acumen that this discipline can convey. I have in fact said this in my Introduction when stating that regulating *ijtihād* is one of the cardinal objectives of *uṣūl al-fiqh*. I have therefore not changed the previous arrangement of titles, but have added a conclusion in which I have taken up the issues pertaining to *ijtihād* and touched on questions such as the theoretical nature of the methodology of *uṣūl al-fiqh*, and its relevance or otherwise to the legislative processes of modern government. This I have done partly in response to a reviewer's comment that the book ended rather abruptly (with the chapter on *ijtihād*) and suggested that a general

conclusion to the text would be desirable. Despite the awareness that a textbook is not the best place in which to address contentious issues, I still thought it worthwhile to convey a certain awareness of the issues in the conclusion. I have consequently commented on the nature of the challenge that Muslim scholars and jurists must take up if the methodology of *uṣūl al-fiqh* and *ijtihād* are to be revitalised and integrated into the processes of law and government in modern times.

Mohammad Hashim Kamali
International Islamic University, Malaysia

...the fact that existing works on Islamic jurisprudence in the English language do not offer an exclusive treatment of *uṣūl al-fiqh*, there is also a need to pay greater attention to the source materials, namely the Qur'an and *Sunnah*, in the study of this science. In English works, the doctrines of *uṣūl al-fiqh* are often discussed in relative isolation from the authorities on which they are founded. Furthermore, these works tend to exhibit a certain difference of style and perspective when they are compared to Arabic works on the subject. The *uṣūl al-fiqh* as a whole and all of the various other branches of the *Shari'ah* bear testimony to the recognition of divine revelation (*wahy*) as the most authoritative influence and source, over and above that of rationality and man-made legislation. This aspect of Islamic law is generally acknowledged, and yet the relevance of *wahy* to the detailed formulations of Islamic law is not highlighted in English works in the same way as one would expect to find in works of Arabic origin. I have, therefore, made an attempt to convey not only the contents of *uṣūl al-fiqh* as I found them in the Arabic sources, but also the tone and spirit of the source materials I consulted. I have given frequent illustrations from the Qur'an, the *Sunnah* and well-recognised works of authority to substantiate the theoretical exposition of ideas and doctrines. The works of the *madhāhib*, in other words, are treated with consideration for the authority on which they are founded.

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Preface

I. Apart from the fact that existing works on Islamic jurisprudence in the English language do not offer an exclusive treatment of *uṣūl al-fiqh*, there is also a need to pay greater attention to the source materials, namely the Qur'an and *Sunnah*, in the study of this science. In English works, the doctrines of *uṣūl al-fiqh* are often discussed in relative isolation from the authorities on which they are founded. Furthermore, these works tend to exhibit a certain difference of style and perspective when they are compared to Arabic works on the subject. The *uṣūl al-fiqh* as a whole and all of the various other branches of the *Shari'ah* bear testimony to the recognition of divine revelation (*wahy*) as the most authoritative influence and source, over and above that of rationality and man-made legislation. This aspect of Islamic law is generally acknowledged, and yet the relevance of *wahy* to the detailed formulations of Islamic law is not highlighted in English works in the same way as one would expect to find in works of Arabic origin. I have, therefore, made an attempt to convey not only the contents of *uṣūl al-fiqh* as I found them in the Arabic sources, but also the tone and spirit of the source materials I consulted. I have given frequent illustrations from the Qur'an, the *Sunnah* and well-recognised works of authority to substantiate the theoretical exposition of ideas and doctrines. The works of the *madhāhib*, in other words, are treated with consideration for the authority on which they are founded.

II. The idea of writing a book on *uṣūl al-fiqh* occurred to me in early 1980 when I was teaching this subject to postgraduate students at the Institute of Islamic Studies at McGill University in Montreal. But it was only after 1985, when I started a teaching post at the International Islamic University, Selangor, Malaysia, that I was able to write the work I had intended. I was prompted to this decision primarily by

the shortage of English textbooks on Islamic jurisprudence for students who seek to acquire an intermediate to advanced level of proficiency in this subject. Works that are currently available in English on Islamic law and jurisprudence are generic in that they tend to treat a whole range of topics both on *uṣūl al-fiqh* and the various branches of *fiqh* (i.e. *fiqh* *al-fiqh*), and often within the scope of a single volume. The information that such works contain on *uṣūl al-fiqh* is insufficient for the purposes of pursuing a full course of study on the subject. The only exception to note here, perhaps, is the area of personal law, that is, the law of marriage, divorce, inheritance, etc., which has been treated extensively, and on which there are a number of English texts currently available. Arabic works on *uṣūl al-fiqh* are, on the whole, exclusive in the treatment of the discipline. There is a selection of textbooks in Arabic, both classical and modern, at present available on this subject, ranging from the fairly concise to the more elaborate and advanced. Works such as 'Abd al-Wahhāb Khallāf's *ʿIlm Uṣūl al-Fiqh*, Abū Zahrah's *Uṣūl al-Fiqh*, Muḥammad al-Khudārī's *Uṣūl al-Fiqh*, and Badrān's *Uṣūl al-Fiqh al-Islāmī* are just some of the well-known modern works in the field. Classical works on *uṣūl al-fiqh*, of which there are many, are, broadly speaking, fairly elaborate, sometimes running into several volumes. I have relied, in addition to the foregoing, on al-Ghazālī's *al-Mustaṣfā min ʿIlm al-Uṣūl*, al-ʿAmīdī's *al-Iḥkām fī Uṣūl al-Aḥkām*, al-Shāṭibī's *al-Muwāfaqāt fī Uṣūl al-Aḥkām* and al-Shawkānī's *Irshād al-Fuḥūl fī Taḥqīq al-Ḥaq min ʿIlm al-Uṣūl*. These are all devoted, almost exclusively, to the juridical subject-matter of *uṣūl al-fiqh*, and rarely, if ever, address the historical development of this discipline beyond such introductory and incidental references as the context may require. Arabic writers tend to treat the historical development of jurisprudence separately from the *uṣūl al-fiqh* itself. There are several Arabic works of modern origin currently available on the history of jurisprudence and its various phases of development, namely: the Prophetic period; the era of the Companions; the early schools of law in the Hijāz and Iraq; the emergence of the *madhāhib*; the era of imitation (*taqlīd*); and the call for a return to *ijtihād*. This discipline is generally known as *tārīkh al-tashrīʿ* which, as the title suggests, is primarily concerned with the history of juristic thought and institutions.¹ Arabic texts on *uṣūl al-fiqh* itself are devoted to the treatment of the sources and methodology of the law, and tend to leave out its historical development.

The reverse of this is true with regard to general works that are currently available on the subject of Islamic jurisprudence in the English

language. Works of Western authorship on this subject are, broadly speaking, primarily concerned with the history of jurisprudence, while the juridical subject-matter of *uṣūl al-fiqh* does not receive the same level of attention. Bearing in mind the nature of this existing English literature, and the fact that there is adequate information available on the history of Islamic jurisprudence in English, the present work does not attempt to address the historical development, and instead focuses on *uṣūl al-fiqh* itself.

Another point to be noted regarding works on Islamic jurisprudence in English by both Muslim and non-Muslim authors is that they are somewhat selective in their treatment of the relevant topics, and certain subjects tend to be ignored or treated only briefly. Consequently, information on some topics, such as the rules of interpretation, classification of words, commands and prohibitions, and textual implications (*al-dalālāt*) is particularly brief and often non-existent in these works. Even some of the more familiar topics such as *qiyās*, *istiṣlāḥ*, *istiḥāb* and *sadd al-dharāʾiʿ* are treated superficially in most English books that are currently in use. The reasons for such omissions are not always clear. The authors might have considered some of these topics to be somewhat technical and involved for English readers, whose interest in *uṣūl al-fiqh* has for a long time remained confined to general and introductory information on the subject. Some of these topics, such as the rules of interpretation, *al-dalālāt*, and the technicalities of *qiyās*, which draw somewhat heavily on the use of Arabic terminology, might have been viewed in this light. The English-speaking student of Islamic studies has been perceived as someone who will have little use for technical detail on *uṣūl al-fiqh*. This might at best offer a plausible explanation, but it is one that carries little weight, especially in view of the greater interest that Islamic legal studies has recently attracted in the West, and in some of the English-speaking institutions of higher learning in Islamic countries themselves.² Moreover, the fact that some Islamic countries have in recent decades shown a fresh interest in developing greater harmony between the *Sharīʿah* and statutory laws has also meant that practising lawyers and judges in these countries are increasingly encouraged to enhance their expertise in the *Sharīʿah* disciplines.

Modern Arabic writings on *uṣūl al-fiqh* tend to differ from the older works on the subject in that the former take cognisance of recent developments both in the Muslim communities and beyond. Thus the reader of many a modern work often comes across comments and comparisons which seek to explain the application and relevance of

the *Shari'ah* doctrines to modern legislation, and to the principles of Western jurisprudence. Much to their credit, some 'ulamā' and writers of modern works have attempted to relate the classical formulations and doctrines of *uṣūl al-fiqh* to the contemporary socio-legal conditions of their communities. There exists a level of concern about the gap that has gradually developed between the *Shari'ah* and modern law, and about the fact that the problem still remains to be tackled. There have also been attempts, be they in the form of individual reform proposals, a call for fresh *ijtihād* about particular issues, or formal resolutions adopted at national and international gatherings of scholars, to tap the resources of *uṣūl al-fiqh* in order to bridge the gap between the *Shari'ah* and modern social conditions. A full account of such developments falls well beyond the scope and objective of the present work.¹ But in discussing certain doctrines such as *ijtihād*, *ijmā'*, *istiḥzān* and *maslahah*, I have attempted to present the modern current of opinion, and occasionally my own views, as to how these principles could be utilised in contemporary legal and judicial processes. I have taken this liberty despite the awareness that it might fall beyond the brief of a work that seeks to be an exposition of the existing doctrines and institutions as they are. I wish to add here that I alone bear full responsibility for the propriety or otherwise of my views.

Furthermore, recent Arabic texts on *uṣūl al-fiqh* tend to treat their subject-matter in a more consolidated and simplified form that makes it manageable for the modern student of law. These works are on the whole more concise than earlier authorities on the subject. It is primarily in matters of format and style that they differ from the older works. As for substantive matters, modern works are normally expected to preserve the continuity of the earlier authorities, and the two are basically indistinguishable in this regard. Having said this, one might add further that modern works tend to differ from their predecessors in one other respect, namely, that the former tend to offer a more even-handed treatment of the views and doctrines of such schools of thought as the Mu'tazilah, the Shi'ah and the Zāhiriyyah, etc., and tend to treat ideas on merit rather than their formal acceptance and recognition by the established *madhāhib*. In addition to the textbook materials on *uṣūl al-fiqh*, a number of legal encyclopedias have emerged in recent decades in Egypt and elsewhere, usually bearing the title '*al-Mawsū'ah al-Fiqhiyyah*', with the express purpose of offering a balanced treatment of the views and contributions of all the prominent schools of law. As a result, the relatively

stronger orientation toward particular schools that is noticeable in the earlier works on *uṣūl al-fiqh*, especially those that were authored after the crystallisation of the *madhāhib*, is not a prominent feature of the modern works. A more open attitude has in fact emerged which seeks to move away from the sectarian bias that can be found in some earlier works, and it is no longer unusual for a Sunni scholar to write on Shi'i thought, scholars and institutions, with a view to highlighting their contributions to Islamic law and jurisprudence. The present writer welcomes this development, but if his own work fails to offer adequate coverage of the doctrines of the various schools, it is due solely to considerations of brevity and space which may be expected of a book of this size.

III. It is perhaps true to say that Islamic jurisprudence exhibits greater stability and continuity of values, thought and institutions when compared to Western jurisprudence. This could perhaps be partially explained by reference to the respective sources of law in the two legal systems. Whereas rationality, custom, judicial precedent, morality and religion constitute the basic sources of Western law, the last two acquire greater prominence in Islamic law. The values that must be upheld and defended by law and society in Islam are not always validated on rationalist grounds alone. Notwithstanding the fact that human reason has always played an important role in the development of *Shari'ah* through the medium of *ijtihād*, the *Shari'ah* itself is primarily founded on divine revelation.

A certain measure of fluidity and overlap with other disciplines such as philosophy and sociology is perhaps true of both Islamic and Western jurisprudence. But it is the latter which exhibits the greater measure of uncertainty regarding its scope and content. Thus according to one observer, books that bear the title 'jurisprudence' vary widely in subject-matter and treatment because 'the nature of the subject is such that no distinction of its scope and content can be clearly determined',² and in Julius Stone's somewhat dramatic phrase, jurisprudence is described as 'a chaos of approaches to a chaos of topics, chaotically delimited'.³

Uṣūl al-fiqh, on the other hand, has a fairly well-defined structure, and the 'ulamā' had little difficulty in treating it as a separate discipline of Islamic learning. Textbooks on *uṣūl al-fiqh* almost invariably deal with a range of familiar topics, and their contents are fairly predictable. This is perhaps reflective of the relative stability that the *Shari'ah* in general and *uṣūl al-fiqh* in particular have exhibited

through their development, almost independently of government and its legislative organs. This factor has also meant, however, that *uṣūl al-fiqh* has, for the most part, been developed by individual jurists who exerted themselves in their private capacity away from government machinery and involvement in the development of juristic thought. Consequently, *uṣūl al-fiqh* has to some extent remained a theoretical discipline and has not been internalised by the legislative machinery of government. The history of Islamic jurisprudence is marred by a polarisation of interests and values between the government and the 'ulamā'. The disaffection of the 'ulamā' with the government, which dates back to the beginning of the Umayyad rule, did not encourage the latter's participation and involvement in the development of juristic thought and institutions, and this has to some extent discouraged flexibility and pragmatism in Islamic jurisprudence. Note, for example, the doctrinal requirements of *ijmā'*, especially the universal consensus of the entire body of the *mujtahidūn* of the Muslim community that is required for its conclusion, a condition which does not concede to considerations of feasibility and convenience. There is also no recognition whatsoever of any role for the government in the doctrine of *ijmā'* as a whole. The government for its part also did not encourage the involvement and participation of the 'ulamā' in its hierarchy, and isolated itself from the currents of juristic thought and the scholastic expositions of the 'ulamā'. The schools of jurisprudence continued to grow, and succeeded in generating a body of doctrine, which, however valuable, was by itself not enough to harness the widening gap between the theory and practice of law in government. One might, for example, know about *qiyās* and *maṣlaḥah*, etc., and the conditions which must be fulfilled for their valid operation. But the benefit of having such knowledge would be severely limited if neither the jurist nor the judge had a recognised role or power to apply it. One might also add here the point that no quick solutions are expected to the problem about the application of the *Shari'ah* in modern jurisdictions. The issue is a longstanding one and is likely to continue over a period of time. It would appear that a combination of factors would need to be simultaneously at work to facilitate the necessary solutions to the problem under discussion. One such factor is the realisation of a degree of consensus and co-operation between the various sectors of society, including the 'ulamā' and the government, and the willingness of the latter to take the necessary steps to bring internal harmony to its laws. To merge and to unify the *Shari'ah* and modern law into an organic unity would hopefully mean that the

duality and the internal tension between the two divergent systems of law could gradually be minimised and removed.

Bearing in mind the myriad and rapidly increasing influences to which modern society is exposed, the possibility of consensus on values becomes ever more difficult to achieve. To come to grips with fluctuations in attitudes towards the basic values that the law must seek to uphold is perhaps the most challenging task for the science of jurisprudence in general. To provide a set of criteria with which to determine the propriety or otherwise of law, and of effective government under the rule of law, is the primary concern of jurisprudence.

The Muslim jurist is often criticised for having lost contact with the changing conditions of contemporary life, in that he has been unable to relate the resources of *Shari'ah* to modern government processes in the fields of legislation and judicial practice. A part of the same criticism is also levelled against government in Islamic countries in that it has failed to internalise *uṣūl al-fiqh* in its legislative practices. The alleged closure of the door of *ijtihad* is one of the factors that are held accountable for the gap between the law and its sources on the one hand, and the changing conditions of society on the other. The introduction of statutory legislation which has already become a common practice in Islamic countries has also affected the role and function of *ijtihad*. Apart from circumventing the traditional role of the jurist/*mujtahid*, the self-contained statutory code and the formal procedures that are laid down for its ratification have eroded the incentive to the jurist's effective participation in legislative construction. Furthermore, the wholesale importation of foreign legal concepts and institutions into Islamic countries, and the uneasy combinations that this has brought about in legal education and judicial practice, are among the sources of general discontent. These and many other factors are in turn accountable for the Islamic revivalism/resurgence which many Muslim societies are currently experiencing.

In view of the diverse influences and the rapid pace of social change visible in modern society, a measure of uncertainty in identifying the correct balance of values is perhaps inevitable. But the quest to minimise this uncertainty must remain the central concern of the science of jurisprudence. The quest for better solutions and more refined alternatives lies at the very heart of *ijtihad*, which must, according to the classical formulations of *uṣūl al-fiqh*, never be discontinued, for *ijtihad* is *wājib kafa'i*, a collective obligation of the

Muslim community and its scholars to exert themselves in order to find solutions to new problems and to provide necessary guidance in matters of law and religion. But even so, an error in *ijtihād* is not only tolerated but is rewarded according to the sincerity and earnestness of the *mujtahid* who attempts it. And it is often through such errors that the best solution can ultimately be reached. One can have different solutions to a particular problem, and sometimes the best solution may be known and yet unattainable due to practical considerations that might limit one's range of choice. In such situations one must surely do that which is possible under the circumstances. But it is imperative not to abandon *ijtihād* completely. It is a common and grave error to say that *ijtihād* is unattainable and that the conditions for its exercise are too exacting to fulfil. To regulate *ijtihād* is indeed the primary objective of *uṣūl al-fiqh* and of what this science teaches regarding the sources of law and methods of interpretation and deduction. A grasp of the concepts and doctrines of *uṣūl al-fiqh* is not only helpful but necessary to *ijtihād* in order to enable the Muslim jurist and legislator to contribute to the ongoing search for better solutions to social issues, and will hopefully also demonstrate that the *Shari'ah*, as well as providing restraints, also possesses considerable flexibility and resources for accommodating social change.

IV. With regard to the translation of technical Arabic terms, I have to some extent followed existing works, especially Abdur Rahim's *Principles of Muhammadan Jurisprudence*. But in the absence of any precedent, or when I was able to find a better alternative, I have improvised the equivalent English terms myself. Most of the Arabic terms are easily translated into English without engaging in technicalities, but there are occasions where this is not the case, and at times the choice of terms is determined by consideration of consistency and style rather than semantic accuracy. To give an example, one of the chapters in this book is devoted to the discussion of textual implications (*al-dalālat*). The five varieties of textual implications, namely *'ibārat al-naṣṣ*, *ishārat al-naṣṣ*, *dalālat al-naṣṣ*, *iqtiḍā' al-naṣṣ* and *mafhūm al-mukhālafah*, each signify a different concept for which an exact English equivalent is difficult to find. I have always tried to give priority to semantic accuracy, but as can be seen this is not the only factor that has determined my choice of 'explicit meaning', 'alluded meaning', 'implied meaning', 'required meaning' and 'divergent meaning' for the foregoing terms respectively, for at times like this, it becomes

difficult to be semantically exact since the shades of meaning and concepts tend to overlap somewhat. A measure of technicality and arbitrariness in the choice of terms is perhaps inevitable in dealing with certain topics of *uṣūl al-fiqh*, such as the classification of words and the rules of interpretation. On such occasions, I thought it helpful not to isolate the English terms from their Arabic originals. I have therefore repeated the Arabic terms frequently enough to relate them to their English equivalents in the text. But when the reader is not sure of the meaning of technical terms, a look at the glossary at the end of the text might prove useful.

The translation of the Qur'anic passages in the text is generally based on Abdullah Yusuf Ali's translation of the Holy Qur'an. On occasion, however, I have replaced elements in this translation with easier and more simplified alternatives. Whenever I have done so, it is usually the result of my having checked more than one translation. The reader will also notice that I have not given the original of the Qur'anic passages in Arabic, as this is not difficult to find. Besides, the Qur'anic text is uniform and there is no variation in the wording of its text in all commonly used printing. But when it comes to the *ḥadīth*, although the main authorities on *ḥadīth* are inclined to maintain consistency in both the concept and wording of the *ḥadīth*, it is nevertheless not unusual to come across inconsistency or variation in the exact wording of a particular *ḥadīth* in different sources. Partly for this reason, but also for the sake of accuracy and convenience, I have given both the Arabic original and the English translation of a *ḥadīth* on its first occurrence in the text. The English rendering of *ḥadīth* consists for the most part of my own translation of the Arabic original; otherwise, I have used the English translation as and when it was available.

A word may also be in order here regarding the English rendering of the terms *fiqh* and *uṣūl al-fiqh*. The difference between them is fairly obvious in their respective Arabic usages: *uṣūl al-fiqh* is unequivocal in its reference to the 'roots of *fiqh*'. This is, however, not so clear in the equivalent English terms which are currently in use. The terms 'Muhammadan law' and 'Islamic law' have often been used in a generic sense and applied both to *fiqh* and *uṣūl al-fiqh*. The same is true of its familiar alternative, 'Islamic jurisprudence'. None of these convey the clarity which is found in their Arabic equivalents. There are, for example, books currently available in English bearing one or the other of these titles, although their contents do not seek to distinguish the two disciplines from each another.

The term 'Muhammadan law' seems to be already falling out of use, and it has almost become an established practice to reserve 'Islamic law' for *fiqh*, and 'Islamic jurisprudence' for *uṣūl al-fiqh*. This use of terminology should be retained. A similar distinction between the terms 'source' and 'proof' would seem advisable. The former should, as far as possible, be reserved for the Qur'ān and *Sunnah*, and the latter for other proofs.

My transliteration of Arabic words is essentially the same as that of the *Encyclopedia of Islam* (New Edition), with two exceptions which have become standard practice: q for k and j for dj.

Finally, I would like to take this opportunity to thank most warmly my colleagues and students at the Faculty of Law, International Islamic University, with whom I have frequently raised and discussed matters of mutual interest. I have often benefited from their views, which have been taken into account in the present work. I would also like to thank the secretarial staff of the Faculty for their unfailing willingness to type for me whenever I approached them. And last but not least, I wish to thank the library staff of the I.I.U. for their assistance, and for being courteous and helpful.

V. Since the publication of the first edition of this book in April 1989, the comments, observations and responses that I have received from scholars, students, and readers have been very positive and encouraging. The changes that I have carried out for the present edition of the book relate to both its content and format, although the overall approach to these changes was to leave the bulk of the original work intact. The changes that I have made are confined to particular parts and they do not entail a recomposition of the original text. I have thus added fresh information and elaborated parts of the chapters on abrogation (*naskh*), analogical reasoning (*qiyās*), and presumption of continuity (*istishāb*). The new information consists either of the elaboration of concepts, or the insertion of additional illustrations for the purposes of clarity and relevance to contemporary concerns in themes of Islamic jurisprudence. The addition to the chapter on *naskh* thus reflects the results of a discussion on a paper entitled 'The Nature, Sources and Objective of the *Shari'ah*' which I presented to a symposium organised by the International Islamic University in Kuala Lumpur in September 1989. The additions to some of the other chapters consist mainly of fresh research and expert opinion on the potential contribution of some of the neglected principles of *uṣūl al-fiqh*, such as *istishāb*, to modern jurisprudence. I have

also refined minor portions of the text in the interest of clarity and precision.

As for the changes of format, these were carried out as a result of my consultation with the editorial staff of the Islamic Texts Society, particularly Mohsen al-Najjar and T.J. Winter. It was thus agreed at the outset to re-set the whole of the original text so as to implement the standard practice of the Islamic Texts Society concerning transliteration, footnotes and minor editorial changes in the text. It is thus hoped that these changes have assured the production of a smoother and more familiar text for readers in Europe and America.

Professor Ahmad Ibrahim, Professor Emeritus and Dean of the Faculty of Law, International Islamic University, Malaysia, has contributed a new Foreword for the second edition. He was kind enough to do so despite his numerous other commitments, and preoccupation with his own writings. I take this opportunity to thank him most warmly for his valuable contribution, and the fact that he wrote a Foreword to both the first and the present editions of this book. He has taken a keen interest in my research and has been most helpful and understanding in relieving me from other commitments so as to enable me to concentrate on writing and research.

Students and colleagues at the International Islamic University have been generous and supportive of my endeavours. I take this opportunity to thank them once again for their thoughtful appreciation. A tangible result of all this is that this book has now become a recommended text in a number of courses not only in the Faculty of Law but also in other faculties and departments of this University.

Mohammad Hashim Kamali
International Islamic University, Malaysia
March 1991

NOTES

1. Note for example Khudari's, *Tārīkh al-Tashrī' al-Ilāmī*; Sābūnī et al., *al-Madkhal al-Fiqhī wa Tārīkh al-Tashrī' al-Ilāmī*; Qattān's *al-Tashrī' wa al-Fiqh fī al-Ilāmī*; *Tārīkh al-Manhajīn*, and al-Nabhān's *al-Madkhal li al-Tashrī' al-Ilāmī*; Nish'atuh, *Adwānuh al-Tārīkhīyah*, *Mustaqbaluh*. For full publication data see my Bibliography.

2. Note for example the International Islamic University of Malaysia, and that of

Islamabad, Pakistan, where *uṣūl al-fiqh* is offered as a core subject both in the LL.B and the masters degree programmes.

3. For an account of the recent trends and developments in scholarly publications, conference resolutions, and the various periodicals and encyclopedias which are designed to promote such tendencies, the reader is referred to Nabhān, *al-Madkhal li al-Tashrīʿ al-Islāmī*, pp. 342-407 and Qattān, *al-Tashrīʿ wa al-Fiqh fi al-Islām*, pp. 331-5.

4. Dias, *Jurisprudence*, p. 1.

5. See this and other statements by Bentham, Dicey and Arnold in Curzon, *Jurisprudence*, p. 13.

CHAPTER ONE

Introduction to *Uṣūl al-Fiqh*

I. Definition and Scope

Uṣūl al-fiqh is concerned with the sources of Islamic law, their order of priority, and the methods by which legal rules may be deduced from the source materials of the *Sharīʿah*. It is also concerned with regulating the exercise of *ijtihād*. The sources of the *Sharīʿah* are of two kinds: revealed and non-revealed. Whereas the former provide the basic evidence and indications from which detailed rules may be derived, the latter provide the methodology and procedural guidelines to ensure correct utilisation of the source evidence. *Uṣūl al-fiqh*, or the roots of Islamic law, thus expound the indications and methodology by which the rules of *fiqh* are deduced from their source evidence. The rules of *fiqh* are thereby derived from the Qurʾān and *Sunnah* in conformity with a body of principles and methods which are collectively known as *uṣūl al-fiqh*.

Some writers have described *uṣūl al-fiqh* as the methodology of law, a description which is accurate but incomplete. Although methods of interpretation and deduction are of primary concern to *uṣūl al-fiqh*, the latter is not exclusively devoted to methodology. To say that *uṣūl al-fiqh* is the science of the sources and methodology of the law is accurate in the sense that the Qurʾān and *Sunnah* constitute the sources as well as the subject-matter to which the methodology of *uṣūl al-fiqh* is applied. The Qurʾān and *Sunnah* contain both specific injunctions and general guidelines on law and religion, but it is the broad and general directives which occupy the larger part of the legal content of these sources. The general directives that are found in the Qurʾān

and *Sunnah* are concerned not so much with methodology as with substantive law and they provide indications which can be used as raw material in the development of law. The methodology of *uṣūl al-fiqh* refers mainly to methods of reasoning such as analogy (*qiyās*), juristic preference (*istiḥṣān*), presumption of continuity (*istiṣḥāb*) and the rules of interpretation and deduction. These are all designed to serve as an aid to the correct understanding of the sources of *Sharī'ah* and *ijtihād*. While the clear directives of the Qur'ān and the *Sunnah* command permanent validity, the methodology of *uṣūl* does not, for it was developed after the revelation of the Qur'ān and *Sunnah* came to an end, and most of it consists of juristic propositions and *ijtihād* advanced by scholars and 'ulamā' of different periods. As an instrument of legal construction and *ijtihād*, the methodology of *uṣūl al-fiqh* must therefore remain open to further adaptation and refinement in order to respond to the changing needs of society and civilisation.

To deduce the rules of *fiqh* from the indications that are provided in the sources is the expressed purpose of *uṣūl al-fiqh*. *Fiqh* as such is the end product of *uṣūl al-fiqh*; and yet the two are separate disciplines. The main difference between *fiqh* and *uṣūl al-fiqh* is that the former is concerned with the knowledge of the detailed rules of Islamic law in its various branches, and the latter with the methods that are applied in the deduction of such rules from their sources. *Fiqh*, in other words, is the law itself, whereas *uṣūl al-fiqh* is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to the language. *Uṣūl al-fiqh* in this sense provides standard criteria for the correct deduction of the rules of *fiqh* from the sources of *Sharī'ah*. An adequate knowledge of *fiqh* necessitates close familiarity with its sources. This is borne out in the definition of *fiqh*, which is 'knowledge of the practical rules of *Sharī'ah* acquired from the detailed evidence in the sources'.¹ The knowledge of the rules of *fiqh*, in other words, must be acquired directly from the sources, a requirement which implies that the *faqīh* must be in contact with the sources of *fiqh*. Consequently, a person who learns *fiqh* in isolation from its sources is not a *faqīh*.² The *faqīh* must know not only the rule that misappropriating the property of others is forbidden, but also the detailed evidence for it in the source, that is, the Qur'ānic *āyah* (2:188) which states: 'Devour not each other's property in defiance of the law.'

ولا تأكلوا أموالكم بينكم بالباطل

This is the detailed evidence, as opposed to saying merely that 'theft is forbidden in the Qur'ān'. *Fiqh* is acquired knowledge which is obtained by study and self-application and is therefore different from inherent knowledge, for example that of God, who is All-Knowing; it is also different from the knowledge of the Prophet, and that of the angel Gabriel, as theirs was given or transmitted to them essentially through revelation.

The word *aṣl* has several meanings, including proof, root, origin and source, such as in saying that the *aṣl* (proof) of this or that rule is *ijmā'*; or in the expression, *uṣūl al-fiqh*, which means the roots of *fiqh* or its underlying evidence. It is also used in the sense of the original rule or norm as in the legal maxim that 'the *aṣl* in all things is permissibility', or when it is said that *al-aṣl barā'ah al-dhimmah*, the norm is absence of liability. *Aṣl* also means the foundation on which something is constructed. When it is said, for example, that *qiyās* or analogy must have an *aṣl*, this may be the Qur'ān or the *Sunnah*. *Aṣl* also means that which is preferable (*al-raḥīh*), such as in the saying that *al-aṣl fī'l kalām al-haqīqah* (the literal meaning is preferable to the metaphorical one). And lastly, *aṣl* and *uṣūl* denote rules or principles on which a branch of knowledge may be founded, such as in *uṣūl al-hadīth*, which is equivalent to *qawā'id al-hadīth*, that is, the rules governing the science of *hadīth*.

Knowledge of the rules of interpretation is essential to the proper understanding of a legal text. Unless the texts of the Qur'ān or the *Sunnah* are correctly understood, no rules can be deduced from them, especially in cases where the text in question is not self-evident. Hence, the rules by which one is to distinguish a speculative text from a definitive one, the manifest (*ẓāhir*) from the explicit (*naṣṣ*), the general ('*amm*) from the specific (*khāṣ*), the literal (*haqīqī*) from the metaphorical (*majāzī*), etc., and how to understand the implications (*dalālat*) of a given text, are among the subjects which warrant the attention in *uṣūl al-fiqh*. An adequate grasp of the methodology and rules of interpretation also ensures the proper use of human reasoning in a system of law which originates in divine revelation. For instance, analogy (*qiyās*) is an approved method of reasoning for the deduction of new rules from the sources of *Sharī'ah*. How analogy should be constructed, what its limits are, and what authority it would command in conjunction, or in conflict, with other recognised proofs are questions which are of primary concern to *uṣūl al-fiqh*. Juristic preference, or *istiḥṣān*, is another rationalist doctrine and a recognised proof of Islamic law. It consists essentially of giving preference to one of the

many conceivable solutions to a particular problem. The choice of one or the other of these solutions is mainly determined by the jurist in the light of considerations of equity and fairness. Which of these solutions is to be preferred and why, and what the limits are of personal preference and opinion in a particular case, is largely a question of methodology and interpretation and therefore forms part of the subject-matter of *uṣūl al-fiqh*.

The principal objective of *uṣūl al-fiqh* is to regulate *ijtihād* and to guide the jurist in his effort at deducing the law from its sources. The need for the methodology of *uṣūl al-fiqh* became apparent when unqualified persons attempted to carry out *ijtihād*, and the risk of error and confusion in the development of *Shari'ah* became a source of anxiety for the 'ulamā'. The purpose of *uṣūl al-fiqh* is to help the jurist obtain an adequate knowledge of the sources of *Shari'ah* and of the methods of juristic deduction and inference. *Uṣūl al-fiqh* also regulates the application of *qiyās*, *istihsān*, *istiṣhāb*, *istiṣlāh*, etc., whose knowledge helps the jurist to distinguish which method of deduction is best suited to obtaining the *ḥukm shar'i* of a particular problem. Furthermore, *uṣūl al-fiqh* enables the jurist to ascertain and compare strength and weakness in *ijtihād* and to give preference to that ruling of *ijtihād* which is in close harmony with the *nuṣūṣ*.

It may be added here that knowledge of the rules of interpretation, the 'āmm, the *khaṣṣ*, the *muṣṭalaq*, the *muqayyad*, etc., is equally relevant to modern statutory law. When the jurist and the judge, whether a specialist in the *Shari'ah* or in secular law, fails to find any guidance in the clear text of the statute on a particular issue, he is likely to resort to judicial construction or to analogy. The skill, therefore, to interpret a legal text and to render judicial decisions is indispensable for a jurist regardless of whether he sits in a *Shari'ah* court or in a court of statutory jurisdiction. A specialist in *uṣūl al-fiqh* will thus find his skill of considerable use in the understanding and interpretation of any legal text.³

To what extent is it true to say that al-Shāfi'i was the founder of *uṣūl al-fiqh*? One theory has it that *uṣūl al-fiqh* has existed for as long as *fiqh* has been known to exist. For *fiqh* could not have come into being in the absence of its sources, and of methods with which to utilise these source materials.⁴ This would, in turn, imply that *uṣūl al-fiqh* existed long before al-Shāfi'i. Numerous examples could be cited to explain how, in early Islam, the Companions deduced the rules of *fiqh* from their sources. *Uṣūl al-fiqh*, in other words, had existed well before the period that saw the emergence of the leading imams of

jurisprudence. But it was through the works of these imams, especially al-Shāfi'i, that *uṣūl al-fiqh* was articulated into a coherent body of knowledge. Even before al-Shāfi'i, we know that Abū Ḥanīfah resorted to the use of analogy and *istiḥsān*, while Imam Mālik is known for his doctrine of the Medinan *ijmā'*, subjects we shall have occasion to return to. When al-Shāfi'i came on the scene, he found a wealth of juristic thought and advanced levels of argumentation on methodological issues. But the existing works were not entirely free of discordance and diversity, which had to be sifted through by the standards which al-Shāfi'i articulated in his legal theory of the *uṣūl*. He devoted his *Risālah* exclusively to this subject, and this is widely acknowledged to be the first work of authority on *uṣūl al-fiqh*.

It is nevertheless accurate to say that *fiqh* precedes *uṣūl al-fiqh* and that it was only during the second Islamic century that important developments took place in the field of *uṣūl al-fiqh*,⁵ since during the first century there was no pressing need for *uṣūl al-fiqh*. When the Prophet was alive, the necessary guidance and solutions to problems were obtained either through divine revelation, or his direct ruling. Similarly, during the period following the demise of the Prophet, the Companions remained in close contact with the teachings of the Prophet, and their decisions were mainly inspired by his precedent. Their proximity to the sources and intimate knowledge of events, provided them with the authority to rule on practical problems without there being a pressing need for methodology.⁶ However, with the expansion of the territorial domain of Islam, the Companions were dispersed and direct access to them became increasingly difficult. With this, the possibility of confusion and error in the understanding of the textual sources became more prominent. Disputation and diversity of juristic thought in different quarters accentuated the need for clear guidelines, and the time was ripe for al-Shāfi'i to articulate the methodology of *uṣūl al-fiqh*. Al-Shāfi'i came on the scene when juristic controversy had become prevalent between the jurists of Medina and Iraq, respectively known as *ahl al-ḥadīth* and *ahl al-ra'y*. This was also a time when the 'ulamā' of *ḥadīth* had succeeded in their efforts to collect and document the *ḥadīth*. Once the *ṣiqaḥā'* were assured of the subject-matter of the *Sunnah*, they began to elaborate the law, and thus the need for a methodology to regulate *ijtihād* became increasingly apparent. The consolidation of *uṣūl al-fiqh* as a *Shari'ah* discipline was, in other words, a logical conclusion of the compilation of the vast literature of *ḥadīth*.⁷

Finally, among the factors which prompted al-Shāfi'i into refining

the legal theory of *uṣūl al-fiqh* was the extensive influx of non-Arabs into Islamic territories and the disconcerting influence that this brought about on the legal and cultural traditions of Islam. Al-Shāfi'i was anxious to preserve the purity of the *Sharī'ah* and of the language of the Qur'ān. In his *Risālah*, al-Shāfi'i enacted guidelines for *ijtihād* and expounded rules governing the *khaṣṣ* and the 'āmm, the *nāsikh* and the *mansūkh*, and articulated the principles governing *ijmā'* and *qiyās*. He set out the rules for relying on the solitary *ḥadīth* (*kehabar al-wāḥid*) and its value in the determination of the *ahkām*. Al-Shāfi'i refuted the validity of *istihsān* and considered it to be no more than an arbitrary exercise in law-making. Admittedly, al-Shāfi'i was not the first to address these matters, but it is widely acknowledged that he brought coherence to *uṣūl al-fiqh*, which had hitherto remained scattered and unconsolidated.⁸

It will be noted in this connection that the Shi'i 'ulamā' have claimed that their fifth Imam, Muḥammad al-Bāqir, and his son and successor, Ja'far al-Ṣādiq, were the first to write on the subject of *uṣūl*. According to Abū Zahrah, who has written extensively on the lives and works of the early imams, the Shi'i imams have, like many others, written on the subject, but neither of the two imams have written anything equivalent to the *Risālah*. Hence al-Shāfi'i's position and contribution to *uṣūl al-fiqh* remains unique, and he is rightly regarded as the founder of *uṣūl al-fiqh*.⁹

The basic outline of the four principal sources of the law that al-Shāfi'i spelt out was subsequently accepted by the generality of 'ulamā', although each of the various schools of jurisprudence has contributed to its further development. The Hanafis, for example, added *istihsān* and custom ('urf) to the *uṣūl al-fiqh*, and the Mālikis limited the concept of consensus (*ijmā'*) to the Medinan consensus only, while the Hanbali approach to the subject closely resembled that of the Mālikis. Even so, none departed significantly from the basic principles al-Shāfi'i articulated.¹⁰

Broadly speaking, the so-called closure of the gate of *ijtihād* at around the fourth Islamic century did not affect *uṣūl al-fiqh* in the same way that it might have affected *fiqh* itself. The era of imitation (*taqlīd*) which followed might even have added to the strength and prominence of *uṣūl al-fiqh* in the sense that the imitators observed, and relied on, the methodology of the *uṣūl* as a yardstick for the validity for their arguments. Consequently, *uṣūl al-fiqh* gained universal acceptance and was, in a way, utilised as a means with which to justify *taqlīd*.¹¹

A brief word may be added here regarding the difference between the *uṣūl* and the maxims of *fiqh* (*al-qawā'id al-fiqhiyyah*), as the two are sometimes confused. The maxims of *fiqh* refer to a body of abstract rules which are derived from the detailed study of *fiqh* itself. They consist of theoretical guidelines in the different areas of *fiqh* such as evidence, transactions, matrimonial law, etc. As such they are an integral part of *fiqh* and are totally separate from *uṣūl al-fiqh*. A large number of legal maxims have been collected and compiled in works known as *al-ashbāh wa al-naẓā'ir*,¹² one hundred of these have been adopted in the introductory section (i.e. the first 100 articles) of the Ottoman *Majallah*. The name '*al-qawā'id al-fiqhiyyah*' may resemble the expression *uṣūl al-fiqh*, but the former is not a part of the latter and the two are totally distinct.

A comparison between *uṣūl al-fiqh* and *uṣūl al-qānūn*, on the other hand, will indicate that these two disciplines have much in common, although they are different in some respects. They resemble one another in that both are concerned with the methodology of the law and the rules of deduction and interpretation; they are not concerned with the detailed rules of the law itself. In the case of the law of property, for example, both *uṣūl al-fiqh* and *uṣūl al-qānūn* are concerned with the sources of the law of property and not with the detailed rules governing transfer of ownership or regulating the contract of sale. These are subjects which fall within the scope of the law of property, not the methodology of law.

Although the general objectives of *uṣūl al-fiqh* and *uṣūl al-qānūn* are similar, the former is mainly concerned with the Qur'ān, *Sunnah*, consensus and analogy. The sources of *Sharī'ah* are, on the whole, well-defined and almost exclusive in the sense that a rule of law or a *ḥukm shar'i* may not originate outside the general scope of its authoritative sources on grounds, for example, of rationality ('aql) alone, for 'aql is not an independent source of law in Islam. *Uṣūl al-fiqh* is thus founded in divine ordinances and the acknowledgement of God's authority over the conduct of man.

Uṣūl al-qānūn, on the other hand, consist mainly of rationalist doctrines, and reason alone may constitute the source of many a secular law. Some of these are historical sources such as Roman Law or British Common Law whose principles are upheld or overruled in light of the prevailing socio-economic conditions of society. The sources of *Sharī'ah*, on the other hand, are permanent in character and may not be overruled on grounds of either rationality or the requirements of social conditions. There is, admittedly, a measure of

flexibility in *uṣūl al-fiqh* which allows for necessary adjustments in the law to accommodate social change. But in principle the *Shari'ah* and its sources can neither be abrogated nor subjected to the limitations of time and circumstance. The role of the jurist and the *mujtahid* in *uṣūl al-fiqh* is basically to deduce and infer rules that are already indicated in the sources, while this is not necessarily the case with regard to *uṣūl al-qānūn*. The Parliament or the legislative assembly of a Western state, being the sovereign authority, can abrogate an existing statute or introduce a new law as it may deem fit. The legislative organ of an Islamic state, on the other hand, cannot abrogate the Qur'an or the *Sunnah*, although it may abrogate a law which is based on *maṣlaḥah* or *istiḥsān*, etc. Abrogation is, on the whole, of limited application to the definite rulings of divine revelation, and basically came to an end with the demise of the Prophet.¹³

Sovereignty in Islam is the prerogative of Almighty God alone. He is the absolute arbiter of values and it is His will that determines good and evil, right and wrong. It is neither the will of the ruler nor of any assembly of men, nor even the community as a whole, that determines the values and the laws which uphold those values. In its capacity as the vicegerent of God, the Muslim community is entrusted with the authority to implement the *Shari'ah*, to administer justice and to take all necessary measures in the interest of good government. The sovereignty of the people, if the use of the word 'sovereignty' is appropriate at all, is a delegated, or executive, sovereignty (*sulṭān tanfīdhī*) only.¹⁴ Although the consensus or *ijmā'* of the community, or of its learned members, is a recognised source of law in Islam, in the final analysis, *ijmā'* is subservient to divine revelation and can never overrule the explicit injunctions of the Qur'an and *Sunnah*. The role of the ballot box and the sovereignty of the people are thus seen in a different light in Islamic law than they are in Western jurisprudence.

And lastly, unlike its Western counterpart, Islamic jurisprudence is not confined to commands and prohibitions, and far less to commands which originate in a court of law. Its scope is much wider, as it is not only concerned with what a man must do or must not do, but also with what he ought to do or ought not to do, and the much larger area of permissibilities (*mubāḥāt*) where his decision to do or to avoid doing something is his own prerogative. *Uṣūl al-fiqh* provides guidance in all these areas, most of which remain outside the scope of Western jurisprudence.

II. Two Approaches to the Study of *Uṣūl al-Fiqh*

Following the establishment of the *madhāhib*, the 'ulamā' of the various schools adopted two different approaches to the study of *uṣūl al-fiqh*, one of which was theoretical and the other deductive. The main difference between these approaches is one of orientation rather than substance. Whereas the former is primarily concerned with the exposition of theoretical doctrines, the latter is pragmatic in the sense that theory is formulated in the light of its application to relevant issues. The difference between the two approaches resembles the work of a legal draftsman as compared to the work of a judge. The former is mainly concerned with the exposition of principles whereas the latter tends to develop a synthesis between the principle and the requirements of a particular case. The theoretical approach to the study of *uṣūl al-fiqh* is adopted by the Shāfi'i school and the Mutakallimūn, that is the 'ulamā' of *kalām* and the Mu'tazilah. The deductive approach is, on the other hand, mainly attributed to the Hanafis. The former is known as *uṣūl al-shāfi'iyyah* or *ṭarīqah al-mutakallimīn*, whereas the latter is known as *uṣūl al-hanafīyyah*, or *ṭarīqah al-fuqahā'*.

Al-Shāfi'i was mainly concerned with articulating the theoretical principles of *uṣūl al-fiqh* without necessarily attempting to relate these to *fiqh* itself. As a methodologist *par excellence*, he established a set of standard criteria which he expected to be followed in the detailed formulation of the rules of *fiqh*. His theoretical exposition of *uṣūl al-fiqh*, in other words, did not take into consideration their practical application in the area of the *furū'*. In addition, the Shāfi'is and the Mutakallimūn are inclined to engage in complex issues of a philosophical character which may or may not contribute to the development of the practical rules of *fiqh*. In this way, subjects such as the 'ismah (infallibility, innocence) of the prophets prior to their prophetic mission, and matters pertaining to the status of the individual or his duties prior to the revelation of the *Shari'ah*, and also logical and linguistic matters of remote relevance to the practical rules of *fiqh*, tend to feature more prominently in the works of the Shāfi'is and Mutakallimūn than in those of the Hanafis. The Hanafis have, on the other hand, attempted to expound the principles of *uṣūl al-fiqh* in conjunction with *fiqh* itself and tend to be more pragmatic in their approach to the subject. In short, the theoretical approach tends to envisage *uṣūl al-fiqh* as an independent discipline to which *fiqh* must conform, whereas the deductive approach attempts to relate *uṣūl al-fiqh* more closely to the detailed issues of the *furū'* *al-fiqh*. When, for

example, the Hanafis find a principle of *uṣūl* to be in conflict with an established principle of *fiqh*, they are inclined to adjust the theory to the extent that the conflict in question is removed, or they try to make the necessary exception in order to reach a compromise.

Three of the most important works that adopt the theoretical approach to *uṣūl al-fiqh* are *al-Mu'tamad fī Uṣūl al-Fiqh* by the Mu'tazili scholar, Abū al-Ḥusayn al-Bāṣrī (d. 436 AH), *Kitāb al-Burhān* of the Shāfi'i scholar Imam al-Haramayn al-Juwaynī (d. 487 AH) and *al-Mustaṣfā* of Imam Abū Ḥamid al-Ghazālī (d. 505 AH). These three works were later summarised by Fakhr al-Dīn al-Rāzī (d. 606 AH) in his work entitled *al-Maḥṣūl*. Sayf al-Dīn al-Āmidī's larger work, *al-Ihkām fī Uṣūl al-Ahkām*, is an annotated summary of the three pioneering works referred to above.

The earliest Hanafi work on *uṣūl al-fiqh* is *Kitāb fī al-Uṣūl* by Abū al-Hasan al-Karkhī (d. 340 AH), which was followed by *Uṣūl al-Jaṣṣas* of Abū Bakr al-Rāzī al-Jaṣṣas (d. 370 AH). Fakhr al-Islām al-Bazdawī's (d. 483 AH) well-known work, *Uṣūl al-Bazdawī*, is also written in conformity with the Hanafi approach to the study of this discipline. This was followed by an equally outstanding contribution by Shams al-Dīn al-Sarakhsī (d. 490 AH) bearing the title, *Uṣūl al-Sarakhsī*. A number of other 'ulamā' have contributed to the literature in both camps. But a difference of format which marked a new stage of development was the writing of handbooks in the form of *mukhtaṣars* with a view to summarising the existing works for didactic purposes.

The next phase in the development of literature on *uṣūl al-fiqh* was marked by the attempt to combine the theoretical and deductive approaches into an integrated whole, which is reflected in the works of both the Shāfi'i and Hanafi 'ulamā' of later periods. One such work which attempted to combine al-Bazdawī's *Uṣūl* and al-Āmidī's *al-Ihkām* was completed by Muzaḥḥar al-Dīn al-Sā'atī (d. 694 AH), whose title *Bad' al-Niẓām al-Jāmi' bayn Uṣūl al-Bazdawī wa al-Ihkām* is self-explanatory as to the approach the author has taken. Another equally significant work combining the two approaches was completed by Ṣadr al-Sharī'ah 'Abd Allāh ibn Mas'ūd al-Bukhārī (d. 747 AH) bearing the title *al-Taḥḍīṭ*, which is, in turn, a summary of *Uṣūl al-Bazdawī*, *al-Maḥṣūl* and the *Mukhtaṣar al-Muntaḥā* of the Māliki jurist, Abū 'Umar 'Uthmān ibn al-Hājib (d. 646 AH). Three other well-known works that have combined the two approaches to *uṣūl al-fiqh* are *Jam' al-Jawāmi'* of the Shāfi'i jurist Tāj al-Dīn al-Subkī (d. 771 AH), *al-Tahrīr* of Kamāl al-Dīn ibn al-Humām al-Hanafi (d. 860 AH), and *Musallam al-Thubūt*

of the Hanafi jurist Muḥibb al-Dīn ibn 'Abd al-Shūkūr (d. 1119 AH). And finally, this list would be deficient without mentioning Abū Ishāq Ibrāhīm al-Shātibī's *al-Muwāfaqāt*, which is comprehensive and perhaps unique in its attention to the philosophy (*hikmah*) of *tashrī'* and the objectives that are pursued by the detailed rulings of the *Sharī'ah*.¹⁵

III. Proofs of Sharī'ah (al-Adillah al-Shar'iyyah)

The *adillah shar'iyyah* and the *ahkām*, that is, the laws or values that regulate the conduct of the *mukallaḥ*, are the two principal themes of *uṣūl al-fiqh*. Of these two, however, the former is by far the more important as, according to some 'ulamā', the *ahkām* are derived from the *adillah* and are therefore subsidiary to them. It is perhaps in view of the central importance of these two topics to *uṣūl al-fiqh* that al-Āmidī defines the latter as the science of the 'proofs of *fiqh* (*adillah al-fiqh*) and the indications that they provide in regard to the *ahkām* of the *Sharī'ah*.¹⁶

A *hukm* (pl. *ahkām*) means proving or establishing one thing in respect of another, which may either be affirmative or negative. Thus when we say that the water is or is not cold, or that the sun has or has not risen, we have issued a *hukm* in each case. A *hukm* in its juridical sense is used mainly to establish a certain value, such as an obligation (*wujūb*), recommendation (*nadb*), or a command or prohibition in respect of the act of legally competent person.¹⁷

Literally, *dalīl* means guide, and it is used interchangeably with proof, indication or evidence. Technically, it is an indication in the sources from which a practical rule of *Sharī'ah*, or a *hukm*, is deduced. The *hukm* so obtained may be definitive (*qaf'i*) or it may be speculative (*ẓannī*) depending on the nature of the subject, the clarity of the text, and the value which it seeks to establish.¹⁸ In the terminology of *uṣūl al-fiqh*, *adillah shar'iyyah* refer to four principal proofs or sources of the *Sharī'ah*, namely the Qur'ān, *Sunnah*, consensus and analogy. *Dalīl* in this sense is synonymous with *asl*, hence the four sources of *Sharī'ah* are known both as *adillah* and *uṣūl*. There are a number of *āyāt* in the Qur'ān which identify the sources of *Sharī'ah* and their order of priority. But one passage in which all the principal sources are indicated occurs in *sūra al-Nisā'* (4:58-59): 'O you believers! Obey God and obey the Messenger and those of you who are in charge of affairs. If you have a dispute concerning any matter, refer it to God and to the Messenger.'

يَأْيُهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولَى الْأَمْرِ
مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ

'Obey God' in this *āyah* refers to the Qur'ān, and 'Obey the Messenger' refers to the *Sunnah*. Obedience to 'those who are in charge of affairs' is held to be a reference to *ijmā'*, and the last portion of the *āyah* which requires the referral of disputes to God and to the Messenger authorises *qiyās*, as *qiyās* is essentially an extension of the injunctions of the Qur'ān and *Sunnah*. The rationale or the effective cause of *qiyās* may be clearly indicated in these sources or it may be identified by way of inference (*istinbāt*). In either case, *qiyās* essentially consists of the discovery of a *hukm* which is already indicated in the divine sources.¹⁹

Some *fuqahā'* have drawn a distinction between *dalīl* and *amārah* (lit. sign or allusion) and apply *dalīl* to the kind of evidence that leads to a definitive ruling or that which leads to positive knowledge ('*ilm*'). *Amārah*, on the other hand, is reserved for evidence or indications that only lead to a speculative ruling.²⁰ In this way, the term '*dalīl*' would only apply to definitive proofs, namely the Qur'ān, *Sunnah* and *ijmā'*, and the remaining proofs, which comprise a measure of speculation, such as *qiyās*, *istihsān*, etc., would fall under the category of *amārah*.

The proofs of *Sharī'ah* have been further divided into transmitted proofs (*adillah naqliyyah*) and rational proofs (*adillah 'aqliyyah*). The authority of the transmitted proofs is independent of their conformity or otherwise to the dictates of reason, although, as we shall elaborate later, most of the transmitted proofs can also be justified rationally. However, the authority and the binding force of the Qur'ān, *Sunnah* and *ijmā'* are independent of any rational justification that might exist in their favour. To these are added two other transmitted proofs, namely the rulings of the Companions, and the laws revealed prior to the advent of Islam (*sharā'ī' man qablanā*).²¹

The rational proofs are, on the other hand, founded in reason and need to be rationally justified. They can only be accepted by virtue of their rationality. *Qiyās*, *istihsān*, *istiślāh* and *istiḥāb* are basically all rationalist doctrines although they are in many ways dependent on the transmitted proofs. Rationality alone is not an independent proof in Islam, which is why the rational proofs cannot be totally separated from the transmitted proofs. *Qiyās*, for example, is a rational proof, but it also relies on the transmitted proofs to the extent that *qiyās*, in

order to be valid, must be founded on an established *hukm* of the Qur'ān, *Sunnah* or *ijmā'*. However, the issue to which *qiyās* is applied (i.e. the *far'*) must have an '*illah*' (effective cause) in common with the original *hukm*. To establish the commonality of the '*illah*' in *qiyās* is largely a matter of opinion and *ijtihād*. *Qiyās* is therefore classified under the category of *adillah 'aqliyyah*. As already indicated, the division of proofs into the transmitted and rational categories is not mutually exclusive as neither of them can function in total isolation: utilising the transmitted proofs for or against something necessarily relies on reason, which is the human tool for comprehension. Similarly, an opinion or *ra'y* can be utilised as the basis for a *hukm* when it is supported by a transmitted proof.

As noted above, the *adillah shar'iyyah* are on the whole in harmony with reason. This will be clear from the fact that the *Sharī'ah* in all its parts is addressed to the *mukallaḥ*, that is, the competent person who is in possession of his faculty of reason. The *Sharī'ah* as a whole does not impose any obligation that contradicts the requirements of '*aql*'. Since the criterion of obligation (*taklīf*) is '*aql*', and without it all legal obligations fall to the ground, it follows that a *hukm sharī'ī* which is abhorrent to '*aql*' is of no consequence.²²

The *adillah shar'iyyah* have been further classified into *mustaqillah* and *muqayyadah*, that is, independent and dependent proofs respectively. Each of the first three sources of the *Sharī'ah* is an independent *asl*, or *dalīl mustaqil*, that is, a proof in its own right. *Qiyās*, on the other hand, is an *asl* or *dalīl muqayyad* in the sense, as indicated above, that its authority is derived from one or other of the three independent sources. The question may arise as to why *ijmā'* has been classified as an independent proof despite the fact that it is often in need of a basis (*sanad*) in the Qur'ān or the *Sunnah*. The answer to this is that *ijmā'* is in need of a *sanad* in the divine sources for its formulation in the first place. However, once the *ijmā'* is concluded, it is no longer dependent on its *sanad* and it becomes an independent proof. Unlike *qiyās*, which continues to be in need of justification in the form of a '*illah*', a conclusive *ijmā'* is not in need of justification and is therefore an independent *asl*.²³

Another classification of *adillah* is their division into definitive (*qat'ī*) and speculative (*ẓannī*) proofs. This division of *dalīl sharī'ī* takes consideration of the proofs of *Sharī'ah* not only in their entirety but also in respect of the detailed rules which they contain. In this way, the Qur'ān, *Sunnah* and *ijmā'* are definitive proofs in the sense that they are decisive and binding. However, each of these sources contains

speculative rules which are open to interpretation. A *dalil* in this sense is synonymous with a *hukm*. A *dalil* may be *qaf'i* in respects of both transmission (*riwāyah*) and meaning (*dalālah*). The clear injunctions of the Qur'ān and *ḥadīth mutawātir* are all *qaf'i* in respect of both transmission and meaning. We shall have occasion later to elaborate on this subject in the context of the characteristic features of Qur'ānic legislation. Suffice it here to say that the Qur'ān is authentic in all its parts, and therefore of proven authenticity (*qaf'i al-thubūt*). The solitary, or *āḥād*, *ḥadīth* on the other hand is of speculative authenticity and therefore falls into the category of speculative proofs.²⁴ Similarly, a ruling of *ijmā'* may have reached us by continuous testimony (*tauwātur*), in which case it will be definitely proven (*qaf'i al-thubūt*). But when *ijmā'* is transmitted through solitary reports, its authenticity will be open to doubt and therefore *ẓannī al-thubūt*.

And lastly, the *adillah* are classified under the following three categories: proofs about which there is unanimous agreement, and these include the Qur'ān and *Sunnah*. Secondly, proofs about which the vast majority (*jumhūr*) are in agreement, and these include general consensus (*ijmā'*) and analogy (*qiyās*). The Nazzām faction of the Mu'tazilah and some Khārijites have rejected *ijmā'*, whereas the Zahirīs and the Ja'farī Shī'ah have disputed the authority of *qiyās*. Thirdly, proofs about which the 'ulamā' have generally disagreed, and this category includes virtually all the remaining varieties of rational proofs, such as juristic preference (*istihsān*), the consideration of public interest (*istiṣlāḥ*), the presumption of continuity (*istiṣḥāb*), custom ('urf), revealed laws prior to the *Sharī'ah* of Islam, and the verdict (*fatwā*) of the Companions. Some 'ulamā' have recognised these as valid proofs and others have not. Even among those who accept the validity of these proofs in principle, there are differences in the degree of prominence they have given them, and in the range of conditions they might have proposed in each case in order to verify the validity and proper application of a particular proof.²⁵

The text of the Qur'ān or the *ḥadīth* may convey a command or a prohibition. According to the general rule, a command (*amr*) conveys obligation (*uṣṭūb*), and prohibition (*nahy*) conveys *tahrim* unless there is evidence to suggest otherwise. It is in the light of the wording of the text, its subject-matter and other supportive evidence that the precise *shar'i* value of a textual ruling can be determined. A command may thus imply a recommendation (*nadh*) or mere permissibility (*ibāḥah*) and not *uṣṭūb*. Likewise, a prohibition (*nahy*) in the Qur'ān or the *Sunnah* may be held to imply abomination (*karāḥah*) and not

necessarily *tahrim*. Consequently, when the precise value of the *qaf'i* and the *ẓannī* on the scale of five values is not self-evident, it is determined by supportive evidence that may be available in the sources, or by *ijtihād*. The *qaf'i* of the Qur'ān and *Sunnah* is basically not open to interpretation. The scope of interpretation and *ijtihād* is consequently confined to the *ẓannī* proofs alone.²⁶

NOTES

1. Āmidī, *Ihkām*, I, 6; Shawkānī, *Ishād*, p. 3.
2. Cf. Abū Zahrah, *Uṣūl*, p. 6.
3. Cf. Badrān, *Uṣūl*, pp. 37-8.
4. Cf. Abū Zahrah, *Uṣūl*, pp. 8ff.
5. Khallāf, *Ilm*, p. 16; Abū Zahrah, *Uṣūl*, p. 10.
6. Ibid., pp. 16-17.
7. Cf. Badrān, *Uṣūl*, p. 12.
8. Ibid., p. 14.
9. Abū Zahrah, *Uṣūl*, p. 13; Badrān, *Uṣūl*, p. 14.
10. Badrān, *Uṣūl*, p. 14.
11. Ibid., p. 14.
12. Two well-known works both bearing the title *al-Ashḥāh wa al-Naẓā'ir* are authored by Jalāl al-Dīn al-Suyūṭī and Ibn Nujaym al-Hanafī respectively.
13. Cf. Badrān, *Uṣūl*, pp. 41-3.
14. Cf. Zaydān, *al-Farḍ wa al-Dawlah*, p. 36.
15. Abū Zahrah, *Uṣūl*, pp. 14-20; Hittū, *al-Wajiz*, pp. 13-14; Zuhayr, *Uṣūl*, I, 4.
16. Āmidī, *Ihkām*, I, 7; Badrān, *Uṣūl*, p. 36.
17. Zaydān, *al-Wajiz*, p. 9.
18. Ibid., p. 9; Badrān, *Uṣūl*, p. 46; Hittū, *Wajiz*, p. 99.
19. Cf. Badrān, *Uṣūl*, pp. 51-2.
20. Āmidī, *Ihkām*, I, 9.
21. Cf. Badrān, *Uṣūl*, pp. 54-5.
22. Āmidī, *Ihkām*, III, 180; Badrān, *Uṣūl*, p. 50.
23. Āmidī, *Ihkām*, I, 260.
24. Shawkānī, *Ishād*, p. 47; Badrān, *Uṣūl*, p. 53; Hittū, *Wajiz*, p. 305.
25. Zaydān, *Wajiz*, p. 148.
26. Khallāf, *Ilm*, p. 35; Abū Zahrah, *Uṣūl*, p. 71; Shalūtī, *al-Isām*, p. 498.

CHAPTER TWO

The First Source of *Shari'ah*: the Qur'ān

Being the verbal noun of the root word *qara'a* (to read), 'Qur'ān' literally means 'reading' or 'recitation'. It may be defined as 'the book containing the speech of God revealed to the Prophet Muḥammad in Arabic and transmitted to us by continuous testimony, or *tauwātūf*'.¹ It is a proof of the prophecy of Muḥammad, the most authoritative guide for Muslims, and the first source of the *Shari'ah*. The 'ulamā' are unanimous on this, and some even say that it is the only source and that all other sources are explanatory to the Qur'ān. The salient attributes of the Qur'ān that are indicated in this definition may be summarised as five: it was revealed exclusively to the Prophet Muḥammad; it was put into writing; it is all *mutawātīr*; it is the inimitable speech of God; and it is recited in *ṣalāh*. The revelation of the Qur'ān began with sūra al-'Alaḥ (96:1) starting with the words, 'Read in the name of your Lord'

اقرأ باسم ربك

and ending with the *āyah* in sūra al-Mā'idah (5:3): 'Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion.'

اليوم أكملت لكم دينكم وأتممت عليكم نعمتي

ورضيت لكم الإسلام ديناً

Learning and religious guidance, being the first and the last themes of the Qur'ānic revelation, are thus the favour of God upon mankind.

The Qur'ān itself indicates that it was sent down and revealed in three successive stages. The first descent was to *Laḥḥ al-Mahfūz* (the 'guarded tablet') in a manner and time that is not known: 'Nay it is a glorious Qur'ān in a guarded tablet' (al-Burūj, 85:21-22).

بل هو قرآن مجيد في لوح محفوظ

The second descent was to the lowest heaven, described as *bayt al-'izzah* ('the abode of honour') and this occurred in the night which the Qur'ān names Laylah al-Qadr: 'Truly We revealed it on the Night of Majesty' (al-Qadr, 97:1).

إنا أنزلناه في ليلة القدر

And then we read in another place 'Truly We revealed it on a blessed night' (al-Dukhān, 44:3).

إنا أنزلناه في ليلة مباركة

Both these passages suggest that the second stage of the revelation occurred in a single night, which is further specified as one of the last ten nights in the month of Ramaḍān. Thus it was only in the last of the three stages that the Qur'ān was revealed to mankind gradually, in about twenty-three years, through the mediation of the archangel Gabriel: 'The Faithful spirit brought it down on your heart that you may be a warner' (al-Shu'arā, 26: 193-194).

نزل به الروح الأمين على قلبك لتكون من المنذرين

There are 114 sūras and 6235 *āyāt* of unequal length in the Qur'ān. The shortest of the sūras consist of four and the longest of 286 *āyāt*. Each chapter has a separate title. The longest sūras appear first and the sūras become shorter as the text proceeds. Both the order of the *āyāt* within each sūra, and the sequence of the sūras, were re-arranged and finally determined by the Prophet in the year of his demise. According to this arrangement, the Qur'ān begins with sūra al-Fātiḥah and ends with sūra al-Nās.²

The contents of the Qur'ān are not classified subject-wise. The *āyāt* on various topics appear in unexpected places, and no particular order

can be ascertained in the sequence of its text. To give just a few examples, the command concerning *ṣalāh* appears in the second sūra, in the midst of other *āyāt* which relate to the subject of divorce (al-Baqarah, 2:228–248). In the same sūra, we find rules which relate to wine-drinking, apostasy and war, followed by passages concerning the treatment of orphans and the marriage of unbelieving women (al-Baqarah, 2:216–221). Similarly, the *āyāt* relating to the pilgrimage of *hajj* occur both in sūra al-Baqarah (2:196–203) and sūra al-Hajj (22:26–27). Rules on marriage, divorce and revocation (*nifāh*) are found in sūras al-Baqarah, al-Talāq, and al-Nisā'. From this a conclusion has been drawn that the Qur'ān is an indivisible whole, and a guide for belief and action that must be accepted and followed in its entirety. Hence any attempt to follow some parts of the Qur'ān and abandon others will be totally invalid. This is in fact the purport of the Qur'ānic text (al-Mā'idah, 5:49) where the Prophet has been warned: 'Beware of them [i.e. the unbelievers] lest they take you away from a part of that which God has sent down to you.'³

واحدهم أن يفتنوك عن بعض ما أنزل الله إليك

The Qur'ān consists of manifest revelation (*wahy ṣāḥir*), which is defined as communication from God to the Prophet Muḥammad, conveyed by the angel Gabriel, in the very words of God. This the Prophet received in a state of wakefulness, and thus no part of the Qur'ān originated in internal inspiration or dreams. Manifest revelation differs from internal revelation (*wahy ḥāṣin*) in that the latter consists of the inspiration (*ilhām*) of concepts only: God inspired the Prophet and the latter conveyed the concepts in his own words. All the sayings, or *ḥadīth*, of the Prophet fall into the category of internal revelation and, as such, are not included in the Qur'ān. A brief word may be added here concerning *ḥadīth qudsī*. In this variety of *ḥadīth*, the Prophet narrates a concept directly from God which may consist either of *wahy ṣāḥir* or *wahy ḥāṣin*, but the latter is more likely. *Ḥadīth qudsī* differs from the other varieties of *ḥadīth* in form only. The Prophet himself has not distinguished *ḥadīth qudsī* from other *ḥadīth*: it was in fact introduced as a separate category by the 'ulamā' of *ḥadīth* at around the fifth century Hijrah. *Ḥadīth* in all of its varieties consists of divine inspiration which is communicated in the words of the Prophet. No *ḥadīth* may be ranked on equal footing with the Qur'ān. Thus *ṣalāh* cannot be performed by reciting the *ḥadīth*, nor is the recitation of *ḥadīth* considered of the same spiritual merit as reciting

the Qur'ān.⁴ The Qur'ān may not be read nor touched by anyone who is not in state of purity (*ṭahārah*), but this is not a requirement with regard to *ḥadīth qudsī*.

The Qur'ān explicitly states that all of it is communicated in pure and clear Arabic (al-Nahl, 16:30). Although the 'ulamā' are in agreement that words of non-Arabic origin occur in the Qur'ān, these are, nevertheless, words which were admitted and integrated into the language of the Arabs before the revelation of the Qur'ān. To give just a few examples, words such as *qistās* (scales – occurring in the sūra al-Isrā', 17:35), *ghassāq* (intensely cold – in sūra al-Naba' (78:25) and *sijjil* (baked clay – in al-Hijr, 15:74) are of Greek, Turkish and Persian origins respectively.⁵ But this usage is confined to odd words; a phrase or a sentence of non-Arabic origin does not occur in the Qur'ān. Since the Qur'ān consists of manifest revelation in Arabic, translations of the Qur'ān into another language, or its commentaries whether in Arabic or in other languages, are not a part of the Qur'ān. However, Imam Abū Hanīfah has held the view that the Qur'ān is the name for a meaning only and, as such, *ṣalāh* may be performed in its Persian translation. But the disciples of Abū Hanīfah have disagreed with this view and it is reported that Abū Hanīfah himself reversed his initial ruling, and this is now considered to be the correct view of the Hanafī school.⁶

The Prophet himself memorised the Qur'ān, and so did his Companions. This was, to a large extent, facilitated by the fact that the Qur'ān was revealed piecemeal over a period of twenty-three years in relation to particular events. The Qur'ān itself explains the rationale of graduality (*tanjīm*) in its revelation as follows: 'The unbelievers say, why has not the Qur'ān been sent down to him [Muḥammad] all at once. Thus [it is revealed] that your hearts may be strengthened, and We rehearse it to you gradually, and well-arranged' (al-Furqān, 25:32).

وقال الذين كفروا لولا نزل عليه القرآن جملة واحدة

كذلك لنثبت به فؤادك ورتلناه ترتيلا

Elsewhere we read in the text: 'It is a Qur'ān We have divided into parts in order that you may recite it to people at intervals: We have revealed it by stages' (al-Isrā', 17:106).

وقرأنا فرقناه لتقرأه على الناس على مكث ونزلناه تنزيلا

In yet another passage, God Almighty addresses the Prophet: 'By degrees shall We teach you to declare [the message] so that you do not forget' (al-A'la, 87:6).

سنقرئك فلا تنسى.

Graduality in the revelation of Qur'ān afforded the believers an opportunity to reflect on it and to retain it in their memories. Revelation over a period of time also facilitated continuous contact between the believers and a renewal of spiritual strength, so that the hostility of the unbelievers toward the new faith did not weaken the hearts of the Muslims. Furthermore, in view of the widespread illiteracy of the Arabs at the time, had the Qur'ān been revealed all at once, they would have found it difficult to understand. Attention was thus initially focused on the rejection of false beliefs and superstitions. This was a preparatory stage for the next phase of teaching, which was concerned with the basic dogma and value structure of Islam; this was followed by the rules of 'ibādāt leading in turn to a fuller exposition of the rules of mu'āmalāt. But this is only a broad description of the thematic aspect of tanjīm (also known as tadarruj) as we should note that a considerable portion of the Qur'ān was revealed in response to questions that the Prophet was being asked from time to time, and also the events that were experienced throughout the years of the revelation. Graduality provided the opportunity to rectify any errors that the Muslims, or even the Prophet himself, might have committed and lessons that could be learned from them. Lastly, the phenomenon of naskh (abrogation), that is abrogation of an earlier ruling at a later stage owing to change of circumstance, is also connected with the gradual unfolding of the Qur'ān, but we shall have more to say on this subject later. Qur'ānic legislation concerning matters which touched the lives of the people was therefore not imposed all at once. It was revealed piecemeal so as to avoid hardship to the believers.⁷ The ban on the consumption of alcohol affords an interesting example of the Qur'ānic method of graduality in legislation, and throws light on the attitude of the Qur'ān to the nature and function of legislation itself. Consumption of alcohol was, apparently, subject to no restriction in the early years. Later, the following Qur'ānic passage was revealed in the form of a moral advice: 'They ask you about alcohol and gambling. Say: in these there is great harm and also benefit for the people, but their harm far outweighs their benefit' (al-Baqarah; 2:219).

يسألونك عن الخمر والميسر قل فيهما إثم كبير ومنافع

للناس وإلهمها أكبر من نفعهما

Then offering prayers while under the influence of alcohol was prohibited (al-Nisā', 4:43). Finally, a total ban on wine-drinking was imposed (al-Ma'idah, 5:90-91) and both alcohol and gambling were declared to be 'works of the devil...The devil wants to sow enmity and rancour among you'.

رجس من عمل الشيطان... إنما يريد الشيطان أن يوقع

بينكم العداوة والبغضاء

This shows the gradual tackling of problems as and when they arose.

The 'ulamā' are in agreement that the entire text of the Qur'ān is mutawātir, that is, its authenticity is proven by universally accepted testimony. It has been retained both in memory and as a written record throughout the generations. Hence nothing less than *tawātir* is accepted as evidence in establishing the authenticity of the variant readings of the Qur'ān. Thus the variant reading of some words in a few *āyāt*, attributed to 'Abd Allāh ibn Mas'ūd, for example, which is not established by *tawātir*, is not a part of the Qur'ān. In the context of the penance (*kaffārāt*) for a false oath, for example, the standard text provides this to be three days of fasting. But Ibn Mas'ūd's version has it as three consecutive days of fasting. Since the additional element (i.e. consecutive) in the relevant *āyah* in sūra al-Ma'idah (5:92) is not established by *tawātir*, it is not a part of the Qur'ān and is, therefore, of no effect.⁸ Similarly, 'Abd Allāh ibn Zubayr added the phrase '*wa-yasta'inūna bi-Allāh 'alā ma aṣābahum*' to the *āyah* in sūra Al 'Imrān (3:104) which accordingly read: 'Let there arise from among you a group that invite others to do good work, enjoining what is right and forbidding what is wrong [and seek help from God when they are afflicted with sufferings]. They shall indeed be granted success.'

ولتكن منكم أمة يدعون إلى الخير ويأمرون بالمعروف

وينهون عن المنكر وأولئك هم المفلحون

This is not established by conclusive testimony (*tawātūr*) either, and it is therefore not part of the Qur'ān. When 'Umar ibn al-Khaṭṭāb heard this, he asked: 'Is it his [Ibn Zubayr's] recitation of the text or his interpretation?' Some commentators maintain that it was an interpretation. There were many other instances of variant readings in different Arabic dialects. Seven such dialects are commonly known to have existed and words were often read with different vowelising, or declensions, that affected the grammatical position and sometimes also the meaning of the text. The variant readings are sometimes adopted as a basis of interpretation. Note, for example, the last word in the *āyah* on the punishment of theft (al-Ma'idah, 5:38) which is '*aydiyahumā*' (their hands) in the standard reading, but which 'Abd Allāh ibn Mas'ūd read to be '*aymanahumā*' (their right hands). The '*ulamā*' and commentators have generally retained the first but adopted the second only within the meaning of the first.⁹ The Hanafis maintain that the unproven text may be acted upon and used as speculative evidence in the interpretation of the Qur'ān because the Companions are deemed to be upright and their readings should be given credit. The Shāfi'is and Mālikis have held that since these portions are claimed to be parts of the Qur'ān and remain unproven, they are rejected altogether.

During the lifetime of the Prophet, the text of the Qur'ān was preserved not only in memories, but also in inscriptions on such available materials as flat stones, wood and bones, which would explain why it could not have been compiled in a bound volume. Initially, the first Caliph, Abū Bakr, collected the Qur'ān soon after the battle of Yamāmah, which led to the death of at least seventy of the memorisers of the Qur'ān. Zayd ibn Thābit, the scribe of the Prophet, was employed in the task of compiling the text, which he accomplished between 11 and 14 AH. But several versions and readings of this edition soon crept into use. Hence the third Caliph, 'Uthmān, once again utilised the services of Zayd to verify the accuracy of the text and compiled it in a single volume. All the remaining variations were then destroyed. As a result, only one authentic text has remained in use to this day.¹⁰

The Qur'ān was revealed in two distinct periods of the Prophet's mission in Mecca and Medina respectively. The larger part of the Qur'ān, that is nineteen out of the total of thirty parts, was received during the first twelve and a half years of the Prophet's residence in Mecca. The remainder of the Qur'ān was received after the Prophet's migration to Medina over a period of just over nine and a half years.¹¹

The Meccan part of the Qur'ān laid down the basic principles of law and religion that were elaborated in Medina. This is the conclusion al-Shāṭibī reached in *al-Muwāfaqāt* (III, 104) saying that a closer examination of the Medinan portions of the Qur'ān reveals that they generally supplement the basic guidelines that were revealed earlier in Mecca.

With reference to the five essential values of Islam, that is, religion, life, intellect, family and property, al-Shāṭibī wrote that all these were in principle enunciated in the Meccan portions of the Qur'ān. In addition to the essentials of belief and monotheism, matters of worship, and disputation with the unbelievers etc., the Meccan Qur'ān also contained legal rulings on the permitted and forbidden varieties of food, the prohibition of murder and infanticide, safeguarding the property of orphans, the prevention of injustice (*ẓulm*), giving due measurement and weight in commercial transactions and a variety of other rulings. Most of the references to bygone nations and prophets, their experiences and the lessons they taught occur in the Meccan part of the Qur'ān, with the obvious purpose of strengthening the resolve of the Prophet and his early Companions in the propagation of the new faith. But the Medinan part of the Qur'ān also comprised legal rules and regulated the various aspects of life in the new environment of Medina. Since the Medinan period signified the formation of the *ummah* and the nascent Islamic state, the Qur'ānic emphasis shifted to principles regulating the political, legal, social and economic life of the new community. During this period, Islam expanded to other parts of Arabia, and the Qur'ānic response to the need for rules to regulate matters of war and peace, the status and rights of the conquered people, the organisation of the family and principles of government feature prominently in the Medinan part of the Qur'ān.¹² The knowledge of the Meccan and the Medinan contents of the Qur'ān gives one an insight into the context and circumstances in which the *āyāt* were revealed; it is particularly relevant to the understanding of the incidence of abrogation (*naskh*) in the Qur'ān. Distinguishing between the abrogating (*al-nāsikh*) and the abrogated (*al-mansūkh*) portions of the text depends on determining the chronological order in the revelation of the relevant *āyāt*. Similarly, most of the general (*āmm*) rulings of the text have been qualified either by the text itself or by *hadith*. Thus the knowledge of the Meccan and Medinan parts of the revelation facilitates a better understanding of some of the characteristic features of the Qur'ānic legislation.

A *sūrah* is considered to be Meccan if its revelation began in Mecca,

even if it contained *āyāt* that were later revealed in Medina. The Qur'ān consists of eighty-five Meccan and twenty-nine Medinan sūras. The differences of content and style that are observed in each are reflective of the prevailing circumstances of each period. Since Muslims were in the minority in Mecca, the Meccan *āyāt* may thus be especially meaningful to Muslims living in a dominantly non-Muslim environment, whereas the Medinan *āyāt* may take for granted the presence of the sovereign authority of the Islamic state. The Meccan sūras are generally short but rhythmical and intense in their emotional appeal to the pagan Arabs, whereas the Medinan sūras are detailed, and convey a sense of serenity that marks a difference of style in the revelation of the Qur'ān.¹³

The distinction between the Meccan and Medinan parts of the Qur'ān is based on the information that is provided mainly by the Companions and the following generation of the 'successors': the Prophet himself has said nothing on the subject. The distinction is also facilitated considerably by internal evidence in the Qur'ān, such as the themes themselves: *āyāt* about warfare were, for example, revealed only after the Hijrah, but references to Abū Lahab in sūra 111 and to the battle of Badr (Āl-Imrān, 3:123) indicate the Meccan origin of the sūras in which they occur. Similarly the form of address is often different in the two parts. The frequent address, 'O you who believe' and 'O people of the Book' indicates a Medinan origin, while 'O people' or 'O mankind' are typically Meccan. There are nineteen sūras in the Qur'ān that begin with abbreviated letters (*al-muqatta'āt*); all of them are known to be Meccan except two, namely al-Baqarah and Āl-Imrān. All references to the *munāfiqūn* (hypocrites) are Medinan and all sūras that contain a *ṣaydah*, that is, an order to prostrate, are Meccan. The distinction between the Meccan and Medinan portions of the text is on the whole a well-established feature of the Qur'ān, which is normally indicated next to the title of each sūra, and the best evidence of such distinction is internal evidence in the Qur'ān itself.¹⁴

With regard to distinguishing the Meccan from the Medinan portions of the Qur'ān, the 'ulamā' have applied three different criteria. (1) The time of revelation, meaning that the part of the Qur'ān which was revealed prior to the Prophet's migration to Medina is classified as Meccan, and the remaining part, which was revealed after this occasion, is identified as Medinan regardless of the locality in which it was received. In this way the *āyāt* which were actually revealed in Mecca after the Year of Victory (*'ām al-fath*) or during the Farewell

Pilgrimage (*hajj al-widā'*) are accounted as Medinan. This is considered to be the most preferred of the three methods under discussion. (2) The place of revelation, which means that all the *āyāt* that were revealed while the Prophet was in Mecca, or its neighbouring areas, such as Minā, 'Arafah and Hudaibiyyah, are classified as Meccan, and *āyāt* that were actually revealed in Medina or its surrounding areas, such as Uhud and Qubā', are classified as Medinan. This criterion is, however, not conclusive in that it leaves out the *āyāt* that were received while the Prophet was travelling to places such as Jerusalem or Tabuk. (3) The nature of the subject-matter and audience, which means that all the parts of the Qur'ān that are addressed to the people of Mecca are classified as Meccan and those which are addressed to the people of Medina are classified as Medinan. In this way all the passages which begin with phrases such as 'O mankind' or 'O people' are Meccan and those which open with phrases such as 'O believers' are typically Medinan.¹⁵

Meccan *āyāt* are also recognised by the occurrence therein of the phrase, *yā banī Adama* (O Children of Adam), narratives and information about previous prophets, and the occurrence of the word *kallā* (not at all, certainly not) indicating argumentation with disbelievers on matters of belief in God, the prophethood of Muhammad, belief in the Hereafter, moral teachings, denunciation of acts of oppression and injustice, and the occurrence in the text of oath-like expressions (*aqām*). Medinan passages are distinguished by references to the people of scripture, permission for *jihād*, references to the *muhājirūn* and the *anṣār* (Emigrants and Helpers) and legislation on a variety of themes.

In the sense that legal material occupies only a small portion of the bulk of its text, the Qur'ān is not a legal or a constitutional document. The Qur'ān calls itself *hudā*, or guidance, not a code of law. Just as it describes itself by such other names as *al-Kitāb*, *al-Wahy*, *al-Dhikr*, *al-Furqān*, *al-Qaṣaṣ* and *al-Tanzil*, that is, the Book, the Revelation, the Reminder, the Distinguisher, the Narratives and the Descended respectively. The name Qur'ān and its meaning occur in the following passage: 'It is for Us to collect and promulgate it. When We have recited it, then follow its recital.' (al-Qiyāmah, 75:17-18).

إِن عَلَيْنَا جَمْعَهُ وَقُرْآنَهُ فَإِذَا قَرَأَهُ فَاتَّبِعْ قِرْآنَهُ

Out of over 6,200 *āyāt*, less than one-tenth relate to law and jurisprudence, while the remainder are largely concerned with matters of belief and morality, the five pillars of the faith and a variety of other

themes. Its ideas of economic and social justice, including its legal contents, are on the whole subsidiary to its religious call.

The legal or practical contents of the Qur'ān (*al-ahkām al-'amaliyyah*) constitute the basis of what is known as *fiqh al-Qur'ān*, or the *corpus juris* of the Qur'ān. There are two types of practical rules in the Qur'ān: those pertaining to *'ibādāt* and those pertaining to *mu'āmalāt*. An *āyah* is classified as one of the *āyāt al-ahkām* (legal verses) if it contains a ruling or *hukm*, even if this occurs in a non-legal context. Those who have applied this method, such as the Mālikī jurist Ibn al-'Arabī, were able to identify a large number of legal *āyāt*. Ibn al-'Arabī thus identified over eight-hundred such *āyāt* in the Holy Book. But those who classified a legal *āyah* only when it occurred in a legal context have identified a smaller number of *āyāt* as falling into the legal category. Among the numerous Qur'ānic commentaries, three are well-known to be comprehensive on *āyāt al-ahkām*. These are Ahmad ibn 'Alī al-Rāzī al-Jassās (d. 370 AH), *Ahkām al-Qur'ān*, Abū Bakr Muḥammad ibn 'Abd Allāh al-'Arabī (d. 543 AH), *Ahkām al-Qur'ān*, and Abū 'Abd Allāh Muḥammad ibn Ahmad al-Qurtubī (d. 671 AH), *al-Jamī' li-Āyāt al-Ahkām*. Unlike the former two, which are not free of scholastic bias in favour of the Ḥanafī and Mālikī schools respectively, the last one is generally free of scholastic bias despite the fact that al-Qurtubī was a follower of the Mālikī school.

The *āyāt al-ahkām* are of three types: those which relate to belief, known as *ahkām i'tiqādiyyah*, those which relate to morality, known as *ahkām khulūqīyah*, and the practical legal rules, known as *ahkām 'amaliyyah*. This last is then sub-divided into the two main categories of *'ibādāt* and *mu'āmalāt*.

There are close to 350 legal *āyāt* in the Qur'ān, most of which were revealed in response to problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs, such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Qur'ān had introduced. But on the whole, the Qur'ān confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary.¹⁶ There are an estimated 140 *āyāt* in the Qur'ān on devotional matters such as *ṣalāh*, legal alms (*zakāh*), *ṣiyām* (fasting), the Pilgrimage of *hajj*, *jihād*, charities and the taking of oaths and penances (*kaffārāt*). Another seventy *āyāt* are devoted to marriage, divorce, the waiting period of *'iddah*, revocation (*nisāh*), dower, maintenance, custody of children, fosterage, paternity, inheritance and bequest. Rules concerning civil and commercial

transactions such as sale, lease, loan and mortgage constitute the subject of another seventy *āyāt*. There are about thirty *āyāt* on crimes and penalties such as murder, highway robbery (*hirābah*), adultery and false accusation (*qadhf*). Another thirty *āyāt* speak of justice, equality, evidence, consultation, and the rights and obligations of citizens. About twenty-five *āyāt* relate to international relations regulating relations between Muslims and non-Muslims. There are about ten *āyāt* relating to economic matters regulating relations between the poor and the rich, workers' rights and so on.¹⁷ It will be noted, however, that the jurists and commentators are not in agreement over these figures, as calculations of this nature tend to differ according to one's understanding of, and approach to, the contents of the Qur'ān.¹⁸

I. Characteristics of Qur'ānic Legislation

We have already described the phenomenon of graduality (*tanjīm*) in Qur'ānic legislation, its division into Meccan and Medinan, and also the fact that the Qur'ān has been revealed entirely in pure Arabic. In the discussion below, I have also included ratiocination (*ta'līl*) among the characteristic features of Qur'ānic legislation, despite the fact that the Qur'ān specifies the effective cause or the rationale of only some of its laws. The Qur'ān is nevertheless quite expressive of the purpose, reason, objective, benefit, reward and advantage of its injunctions. Since the Qur'ān addresses the conscience of the individual with a view to persuading and convincing him of the truth and the divine origin of its message, it is often combined with allusions to the benefit that may accrue from the observance of its commands or the harm that is prevented by its prohibitions. This is a feature of the Qur'ānic legislation that is closely associated with ratiocination (*ta'līl*) and provides the *mujtahid* with a basis on which to conduct further enquiry into *ta'līl*. However, of all the characteristic features of Qur'ānic legislation, its division into *qaf'i* and *zannī* is perhaps the most significant and far-reaching, as it relates to almost any aspect of enquiry into Qur'ānic legislation. I shall therefore take up this subject first.

I.1 The Definitive (*Qaf'i*) and the Speculative (*Zannī*)

A ruling of the Qur'ān may be conveyed in a text which is either unequivocal and clear, or in language that is open to different interpretations. A definitive text is one which is clear and specific; it has

only one meaning and admits no other interpretations. An example of this is the text on the entitlement of the husband in the estate of his deceased wife: 'In what your wives leave, your share is a half, if they leave no child' (al-Nisā', 4:12).

ولكم نصف ما ترك أزواجكم إن لم يكن لهن ولد

Other examples are: 'The adulterer, whether a man or a woman, flog them each a hundred stripes' (al-Nūr, 24:2)

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

and 'Those who accuse chaste women of adultery and fail to bring four witnesses [to prove it], flog them eighty stripes' (al-Nūr, 24:4).

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء

فاجلدوهم ثمانين جلدة

The quantitative aspects of these rulings, namely one half, one hundred and eighty, are self-evident and therefore not open to interpretation. The rulings of the Qur'ān on the essentials of the faith such as *ṣalāh* and fasting, the specified shares in inheritance and the prescribed penalties, are all *qaf'i*: their validity may not be disputed by anyone; everyone is bound to follow them; and they are not open to *ijtihād*.

The speculative *āyāt* of the Qur'ān are, on the other hand, open to interpretation and *ijtihād*. The best interpretation is that which can be obtained from the Qur'ān itself, that is, by looking at the Qur'ān as a whole and finding the necessary elaboration elsewhere in a similar or even a different context. The *Sunnah* is another source that supplements the Qur'ān and interprets its rulings. When the necessary interpretation can be found in an authentic *ḥadīth*, it becomes an integral part of the Qur'ān and both together carry a binding force. Next in this order come the Companions, who are particularly well-qualified to interpret the Qur'ān in the light of their close familiarity with its text, the surrounding circumstances, and the teachings of the Prophet.¹⁹

An example of the *ẓannī* in the Qur'ān is the text that reads: 'Prohibited to you are your mothers and your daughters' (al-Nisā', 4:23).

حرمت عليكم أمهاتكم وبناتكم.

This text is definitive in regard to the prohibition of marriage with one's mother and daughter and there is no disagreement on this point. However, the word *banātukum* ('your daughters') could be taken literally, which would be a female child born to a person either through marriage or through *zinā*, or for its juridical meaning. In the latter sense '*banātukum*' can only mean a legitimate daughter.

The jurists are in disagreement about which of these meanings should be read into the text. The Hanafis have upheld the first of the two meanings and have ruled on the prohibition of marriage to one's illegitimate daughter, whereas the Shāfi'is have upheld the second. According to this interpretation, marriage with one's illegitimate daughter is not forbidden as the text only refers to a daughter through marriage. It would follow from this that the illegitimate daughter has no right to inheritance, and the rules of guardianship and custody do not apply to her.²⁰

In a similar vein, the '*ulamā*' have differed on the definition of futile, as opposed to deliberate, oaths which occur in *sūra al-Mā'idah* (5:89): 'God will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths.'

لا يؤاخذكم الله باللغو في أيمانكم ولكن يؤاخذكم بما عقدتم الأيمان

The text then continues to spell out the expiation, or *kaffārah*, for deliberate oaths, which consists of either feeding ten hungry persons who are in need, or setting a slave free, or fasting for three days. According to the Hanafis, a futile oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The majority have, on the other hand, held it to mean taking an oath which is not intended, that is, when taken in jest without any intention. Similar differences have arisen concerning the precise definition of what may be considered as a deliberate oath (*yāmīn al-mu'aqqadah*).²¹ There is also disagreement about whether the three days of fasting should be consecutive or could be three separate days. Hence the text of this *āyah*, although definitive on the basic requirement of *kaffārah* for futile oaths, is speculative in regard to the precise terms of the *kaffārah* and the manner of its implementation.

To give another example of *ẓannī* in the Qur'ān, we may refer to the phrase *yunfau min al-ard* ('to be banished from the earth') which

occurs in sūra al-Mā'idah (5:33). The phrase spells out the penalty for highway robbery (*hirābah*) or, according to an alternative but similar interpretation, for waging war on the community and its legitimate leadership. Banishment (*naḥy*) in this *āyah* can mean exile from the place where the offence is committed in the first place. This is, in fact, the obvious meaning of the phrase, and the one which has been adopted by the majority of the 'ulamā'. But the Hanafī jurists maintain that the phrase means imprisonment, not exile. According to the Hanafīs, a literal approach to the interpretation of this phrase does not prove to be satisfactory: if one is to be literal, then how can one be banished from the face of the earth by any method but death? *Naḥy*, or exile, on the other hand, is a penalty other than killing. Furthermore, if the offender is to be banished from one place to another within the Muslim territories, the harm is not likely to be prevented as he may commit further offences. The Hanafīs have further argued that banishing a Muslim outside the territory of Islam is not legally permissible. The only proper meaning of the phrase that would achieve the *Sharī'ah* purpose behind the penalty is, therefore, imprisonment.

And lastly, the whole *āyah* of *muḥārabah* in which the phrase *yunḥaw min al-ard* occurs is open to divergent interpretations. The *āyah* in question reads:

The punishment of those who wage war against God and His Messenger and strive to make mischief in the land is that they should be killed or crucified or their hands and their feet should be cut off on opposite sides, or they should be banished from the earth.

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ
فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ
مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ

In this passage, confusion arises from the combination of phrases which contain different penalties for *hirābah*. This is mainly due to the use of the article *aw*, meaning 'or', between the three phrases that provide three different penalties for the offence in question. It is thus not known for certain which of the three penalties are to be applied to the offender, that is, the *muḥārib*. The majority view is that the *muḥārib* is liable to execution when he actually robs and kills his victim, but if he only robs him, the offender is liable to the mutilation of his

hands. And finally, if there is no killing involved and no robbery, then the penalty is banishment. In the more intense cases where the offender terrorises, kills and robs his victim, the former is to be killed and crucified. According to an alternative juristic opinion, it is for the ruler to determine one or the other, or a combination of these penalties, in individual cases.

A Qur'ānic injunction may simultaneously possess a definitive and a speculative meaning, in which case each of the two meanings will convey a ruling independently of the other. An example of this is the injunction concerning the requirement of ablution for prayers which reads in part 'and wipe your heads' (al-Mā'idah, 5:6).

وَامْسَحُوا بِرُءُوسِكُمْ

This text is definitive on the requirement of wiping (*mash*) of the head in *wuḍū'*, but since it does not specify the precise area of the head to be wiped, it is speculative in regard to this point. Hence we find that the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction.²²

There are sometime instances where the scope of disagreement about the interpretation of the Qur'ān is fairly extensive. Maḥmūd Shaltūt, for example, underlines this point by noting that at times seven or eight different juristic conclusions have been arrived at on one and the same issue. And he goes on to say that not all of these views can be said to be part of the religion, nor could they be legally binding. These are *ijtihādī* opinions; *ijtihād* is not only permissible but is encouraged. For the *Sharī'ah* does not restrict the liberty of the individual to investigate and express an opinion. They may be right or they may be wrong, and in either case, the diversity of opinion offers the political authority a range of choice from which to select the view it deems to be most beneficial to the community. When the ruler authorises a particular interpretation of the Qur'ān and enacts it into law, it becomes obligatory for everyone to follow only the authorised version.²³

The 'ulamā' are in agreement that the specific (*khāṣṣ*) of the Qur'ān (and of *Sunnah*) is definitive, but they are in disagreement as to whether the general (*'āmm*) is definitive or speculative. The Hanafīs maintain that the 'āmm is definitive and binding but the Mālikīs, Shāfi'īs and Hanbalīs hold that the 'āmm by itself is speculative and open to qualification and specification. We need not, at this point, go into the details of the 'āmm and the *khāṣṣ* as we shall have occasion

to return to the subject later. Suffice it here to explain how the 'āmm and *khāṣṣ* may be related to *qaf'i* and *ẓannī*.

First we may highlight the *ẓannī* content of the 'āmm by referring to the Qur'ānic ruling which states: 'Forbidden to you [in marriage] are your mothers, your daughters, your sisters, your father's sisters and your mother's sisters' (al-Nisā', 4:23).

حرمت عليكم أمهاتكم وبناتكم وأخواتكم وعماتكم
وخالاتكم

This is a general ruling in that mothers, daughters, sisters, etc. are all 'āmm as they include, in the case of 'mother', not only the real mother but also the step-mother, foster mother and even the grandmother. Similarly, 'daughters' can include real daughters, step-daughters, grand-daughters and even illegitimate daughters. The application of these terms to all of their various meanings is *qaf'i* according to the Hanafis, but is *ẓannī* according to the majority of 'ulamā'. Whenever the *ẓannī* of the Qur'ān is explained and clarified by the Qur'ān itself or by the *Sunnah*, it may become *qaf'i*, in which case the clarification becomes an integral part of the original ruling. On the subject of prohibited degrees in marriage, there is ample evidence both in the Qur'ān and the *Sunnah* to specify and elaborate the 'āmm of the Qur'ān on this subject. Similarly, when the Qur'ān or the *Sunnah* specifies a general ruling of the Qur'ān, the part which is so specified becomes *qaf'i*.

To give another example of the 'āmm which can be clearly seen in its capacity as *ẓannī* we refer to the Qur'ānic proclamation that 'God has permitted sale and prohibited usury' (al-Baqarah, 2:275).

وأحل الله البيع وحرم الربا

This is a general ruling in the sense that sale, that is any sale, is made lawful. But there are certain varieties of sale which are specifically forbidden by the *Sunnah*. Consequently, the 'āmm of this *āyah* is specified by the *Sunnah* to the extent that some varieties of sale, such as the sale of unripe fruit on a tree, or a sale that involve uncertainty or risk-taking (*gharar*) were forbidden and therefore excluded from the scope of this *āyah*. The 'ulamā' are all in agreement to the effect that once the 'āmm has been specified even in a narrow and limited sense, the part which still remains unspecified is reduced to *ẓannī* and will be treated as such.

Broadly speaking, the *khāṣṣ* is definitive. When, for example, the Qur'ān (al-Nūr, 24:4) prescribes the punishment of eighty lashes for slanderous accusation (*qadhif*), the quantitative aspect of this punishment is specific (*khāṣṣ*) and not susceptible to any speculation. But then we find that the same passage (al-Nūr, 24:4-5) prescribes a supplementary penalty for the slanderous accuser (*qadhif*) where it reads: 'Never accept their testimony, for they are evildoers [*fāsiqūn*], except for those who repent afterwards and make amends.'

ولا تقبلوا لهم شهادة أبدا وأولئك هم الفاسقون إلا الذين
تابوا من بعد ذلك وأصلحوا

This text is clear and definitive on the point that the *qadhif* is to be disqualified as a witness, but then an element of doubt is introduced by the latter portion of the text which tends to render ambiguous the precise scope of its application. Having enacted both the principal and the supplementary penalties for slanderous accusers and *fāsiqūn* it becomes questionable whether the *qadhif* should qualify as a witness after repentance. Does the text under discussion mean that the concession is only to be extended to the *fāsiqūn* and not necessarily to slanderous accusers? If the answer is in the affirmative, then once the *qadhif* is convicted of the offence, no amount of repentance will qualify him as an upright witness again. The confusion is due to uncertainty in the meaning of the pronoun *alladhīna* (i.e. 'those') which is not known to refer to all or only part of the preceding elements in the text. The Hanafis disqualify the *qadhif* permanently from being a witness, whereas the Shāfi'is would admit him as a witness after repentance. This example also serves to show that it is not always self-evident whether a text is *qaf'i* or *ẓannī* as this too may be open to interpretation. The main point of citing this example is to show that although the *khāṣṣ* is *qaf'i*, an aspect of it may be *ẓannī* in a way that might affect the definitive character of the *khāṣṣ* as a whole.

Although in principle the *khāṣṣ* is *qaf'i* and, as such, is not open to speculative interpretation, there may be exceptions to this general rule. For example, the penance (*kaffārah*) of a false oath according to a textual ruling of the Qur'ān (al-Mā'idah, 5:89) is of three types, one of which is to feed ten poor persons. This is a specific ruling in the sense that 'ten poor persons' has only one meaning. But even so, the Hanafis have given this text an alternative interpretation, which is that instead of feeding ten poor persons, one such person may be fed

ten times. The majority of 'ulamā', however, do not agree with the Hanafis on this point. Be that as it may, this example will serve to show that the scope of *ijtihād* is not always confined to the 'āmm but that even the *khāṣṣ* and definitive rulings may require elaboration which might be based on speculative reasoning.

Furthermore, the *khāṣṣ* of the Qur'ān normally occurs in the form of a command or a prohibition which, as discussed below in a separate chapter, can either be *qaf'i* or *ẓannī*. The *ẓannī* component of a command or a prohibition is readily identified by the fact that a command in the Qur'ān may amount either to *wājib* or to *mandūb* or even to a mere *mubāh*. Similarly, it is not always certain whether a prohibition in the Qur'ān amounts to a total ban (*tahrim*) or to a mere abomination (*karāhah*).

The absolute (*muṣṭaq*) and the qualified (*muqayyad*) are also classified as the sub-varieties of *khāṣṣ*. But these too can be related to the *qaf'i-ẓannī* division in at least two ways. Firstly, the absolute, somewhat like the 'āmm, is speculative in regard to the precise scope of its application. Secondly, the qualification of the absolute, the grounds on which it is qualified and the nature of the relationship between the qualified and the qualifier are not always a matter of certain knowledge. The absolute in the Qur'ān is sometimes qualified on speculative grounds, which is why the jurists are not in agreement about the various aspects of qualifying the *muṣṭaq*. Further detail on the subject of *muṣṭaq* and *muqayyad* and juristic disagreements about its various aspects can be found in a separate chapter below. Suffice it here to give an illustration: there are two separate rulings on the subject of witnesses in the Qur'ān, one of which is absolute and the other qualified in regard to the attributes of the witness. First it is stated with regard to the transaction of sale to 'bring witnesses when you conclude a sale' (al-Baqarah, 2:282).

وَأَشْهِدُوا إِذَا تَبَايعْتُمْ

In this *āyah*, the witness is not qualified in any way whatsoever. But elsewhere we find in reference to the subject of revocation in divorce (*nif'ah*), the command to 'bring two just witnesses' (al-Talāq, 65:2).

وَأَشْهِدُوا ذَوَى عَدْلٍ مِنْكُمْ

The 'ulamā' have on the whole related these two *āyāt* to one another and the conclusion drawn is that the qualified terms of the second

āyah must also be applied to the first, which would mean that witnesses must be upright and just whether it be a case of a commercial transaction or of revocation in divorce. This is the settled law, but to relate this to our discussion on the *qaf'i* and the *ẓannī*, it will be noted that determining the precise scope of the first *āyah* is open to speculation. Does the requirement of witnesses apply only to sale or to all commercial transactions? To enter into a detailed discussion on this point might seem out of place in the face of the fact that, notwithstanding the clear terms of the Qur'ānic injunction, the rules of *fiqh* as developed by the majority of 'ulamā', with the exception of the Zāhiris, do not require any witnesses either in sale or in the revocation of divorce. The 'ulamā' have, of course, found reasons in support of their rulings both from within and outside the Qur'ān. But even the bare facts we have discussed so far are enough to show that the *muṣṭaq* and *muqayyad* are susceptible to speculative reasoning. But to discuss the foregoing example a little further, it will be noted that the juxtaposition of the two *āyāt*, and the conclusion that the one is qualified by the other, is to a large extent based on speculative reasoning. And then the qualified terms of the second of the two *āyāt* may be taken a step further, and the question is bound to be raised, as indeed it has been, as to the precise meaning of a just witness. The 'ulamā' of the various schools have differed on the attribute of 'adālah in a witness and their conclusions are based largely on speculative *ijtihād*.

We need not perhaps discuss in detail the point that the binary division of words into the literal (*haqiqī*) and the metaphorical (*majāzī*), which we shall elsewhere elaborate on, can also be related to the *qaf'i* and *ẓannī*. Although relying on the literal meaning of a word is the norm and a requirement of certainty in the enforcement of a legal text, it may be necessary at times to depart from the literal in favour of the metaphorical meaning of a word. To give an example, *talāq* literally means release or setting free but, as a technical term, it has acquired a specific meaning, and it is the metaphorical meaning of *talāq* which is normally applied. The 'ulamā' have identified a large variety of grounds on which the *haqiqī* and the *majāzī* can be related to one another. The *majāzī* is to a large extent speculative and unreal. Some 'ulamā' have even equated the *majāzī* with falsehood and, as such, have held that it has no place in the Qur'ān. It is thus suggested that the *majāzī* is not to be relied upon in interpreting the practical injunctions of the Qur'ān. Be this as it may, the point is clear that speculative reasoning has a wide scope in determining the meaning

and application of *ḥaḡīf* and *majāzī* in the Qur'ān, and indeed in any other source of *Sharī'ah*.

Furthermore, the 'ulamā' have deduced the rules of *Sharī'ah* not only from the explicit words of the Qur'ān, which is referred to as the *maṣṭūq*, but also from the implicit meanings of the text through inference and logical construction, which is referred to as the implied meaning, or *maṣṭūm*. Once again, this subject has been discussed in a separate chapter under *al-dalālāt*, that is, textual implications. The only purpose of referring to this subject here is to point out that the deduction of the rules of *Sharī'ah* by way of inference from the implied meaning of a text amounts to speculative reasoning and *ijtihād*. Naturally, not all the *ahkām* deduced in this way can be classified as *ẓannī*. The implied meaning of a text can often command the same degree of authority as the explicit ruling of the same text. Having said this, however, to extend, for example, the requirement of expiation (*kaffārāh*) for unintentional killing – which is releasing a slave, or feeding sixty poor persons, or fasting for two months – to the case of intentional killing on the analysis that the purpose of *kaffārāh* is compensation for a sin and that this is true of all types of homicide, is basically no more than speculative *ijtihād*. This is the implied meaning of the text in *sūra al-Nisā'*, 4:92, which is explicit on the *kaffārāh* for unintentional killing. But the implied meaning of this text does not command the same degree of certainty as the clear words thereof, which is why the 'ulamā' are not in agreement on it.

In the discussion of the *qaf'i* and *ẓannī*, the Qur'ān and *Sunnah* are seen as complementary and integral to one another, the reason for this being that the speculative of the Qur'ān can be made definitive by the *Sunnah* and vice versa. The *ẓannī* of the Qur'ān may be elevated into *qaf'i* by means of corroborative evidence in the Qur'ān itself or in the *Sunnah*. Similarly, the *ẓannī* of the *Sunnah* may be elevated into *qaf'i* by means of corroborative evidence in the *Sunnah* itself or in the Qur'ān. And then the *ẓannī* of both the Qur'ān and *Sunnah* may be elevated into *qaf'i* by means of a conclusive *ijmā'*, especially the *ijmā'* of the Companions.

As stated above, a speculative indication in the text of the Qur'ān or *ḥadīth* may be supported by a definitive evidence in either, in which case it is as valid as one which was definitive in the first place. To illustrate this, all the solitary (*āḥād*) *ḥadīth* which elaborate the definitive Qur'ānic prohibition of usury (*ribā*) in *sūra al-Baqarah* (2:275) are speculative by virtue of being *āḥād*. But since their substance is supported by the definitive text of the Qur'ān, they become definitive

despite any doubt that may exist in respect of their authenticity. Thus as a general rule, all solitary *ḥadīth* whose authenticity is open to speculation are elevated to the rank of *qaf'i* if they can be substantiated by clear evidence in the Qur'ān.²⁴ However, if the *ẓannī* cannot be so substantiated by the *qaf'i*, it is not binding unless it can be validated by some evidence that may lead to one of the following two possibilities. Firstly, the case where the *ẓannī* is found to be in conflict with a *qaf'i* of the Qur'ān, in which case it must be rejected. To illustrate this, it is reported that the widow of the Prophet, 'Ā'isha, rejected the alleged *ḥadīth* that the soul of the deceased is tortured by the weeping of his relatives over his death,²⁵ the reason being that this was contrary to the definitive text of the Qur'ān (*al-An'ām*, 6:164) which states that 'no soul may be burdened with the burden of another soul'.

ولا تزر وزر أخرى

The second case is where the speculative indication is such that it cannot be related to definitive evidence in any way. The 'ulamā' have differed on this; some would advise suspension while others would apply the presumption of permissibility (*ibāḥah*), but the best view is that the matter is open to *ijtihād*.²⁶

The *qaf'i* of the Qur'ān is an integral part of the dogma, and anyone who rejects or denies its validity automatically renounces Islam. But denying a particular interpretation of the *ẓannī* does not amount to transgression. The *muṭtahid* is entitled to give it an interpretation, and so is the ruler, who may select one of the various interpretations for purposes of enforcement.²⁷

I.2 Brevity and Detail (*al-Ijmāl wa'l-Taḡṣīl*)

By far the larger part of Qur'ānic legislation consists of an enunciation of general principles, although in certain areas, the Qur'ān also provides specific details. Being the principal source of the *Sharī'ah*, the Qur'ān lays down general guidelines on almost every major topic of Islamic law. In commenting on this point, Abū Zahrah concurs with Ibn Hazm's assessment that 'every single chapter of *fiqh* finds its origin in the Qur'ān, which is then explained and elaborated by the *Sunnah*'.²⁸ On a similar note, al-Shāṭibī makes the following observation: experience shows that every 'ālim who has resorted to the Qur'ān in search of the solution to a problem has found in the Qur'ān a principle that has provided him with some guidance on the subject.²⁹

The often-quoted declaration that 'We have neglected nothing in the Book' (al-Ān'ām, 6:38)

ما فرطنا في الكتاب من شيء

is held to mean that the *ru'ūs al-ahkām*, that is, the general principles of law and religion, are treated exhaustively in the Qur'ān.³⁰ According to another view, the reference here is to religion, on which the Qur'ān provides complete guidance, and this is confirmed in another *āyah* as follows: 'Today I have perfected for you your religion and completed my favour upon you and chosen Islam as your religion' (al-Mā'idah, 5:3).

اليوم أكملت لكم دينكم وأتممت عليكم نعمتي ورضيت لكم الإسلام ديناً

That the Qur'ān is mainly concerned with general principles is borne out by the fact that its contents require a great deal of elaboration, which is often provided, although not exhaustively, by the *Sunnah*. To give an example, the following Qur'anic *āyah* provides the textual authority for all the material sources of the *Sharī'ah*, namely the Qur'ān, the *Sunnah*, consensus and analogy. The *āyah* reads: 'O you who believe, obey God and obey the Messenger, and those of you who are in authority; and if you have a dispute concerning any matter refer it to God and to the Messenger' (al-Nisā', 4:59).

يأيتها الذين آمنوا أطيعوا الله وأطيعوا الرسول وأولى الأمر منكم فإن تنازعتم في شئ فردوه إلى الله والرسول

'Obey God' in this *āyah* refers to the Qur'ān as the first source, 'and obey the Messenger' refers to the *Sunnah* of the Prophet, 'and those of you who are in authority' authorises the consensus of the '*ulamā'*'. The last portion of the *āyah* ('and if you have a dispute...') validates *qiyās*. For a dispute can only be referred to God and to the Messenger by extending the rulings of the Qur'ān and *Sunnah* through analogy to similar cases. In this sense one might say that the whole body of *uṣūl al-fiqh* is a commentary on this single Qur'anic *āyah*.³¹ Al-Shāṭibī further observes that wherever the Qur'ān provides specific details, it is related to the exposition and better understanding of its general

principles.³² Most of the legal contents of the Qur'ān consist of general rules, although it contains specific injunctions on a number of topics. Broadly speaking, the Qur'ān is specific on matters that are deemed to be unchangeable, but in matters that are liable to change, it merely lays down general guidelines.

Qur'anic legislation is generally detailed on devotional matters and subjects that have a devotional (*ta'abbudī*) aspect, such as matrimonial law and inheritance. These are deemed to be permanent and the rulings so enacted are followed primarily as a matter of devotion and submission to the law of God. As for the laws of the Qur'ān on civil transactions or *mu'āmalāt*, these are generally confined to an exposition of the broad and general principles, and they remain open to interpretation and *ijtihad*.³³

Qur'anic legislation on civil, economic, constitutional and international affairs is, on the whole, confined to an exposition of the general principles and objectives of the law. With regard to civil transactions, for example, the *muṣāḥ* of the Qur'ān on the fulfilment of contracts, the legality of sale, the prohibition of usury, respect for the property of others, the documentation of loans and other forms of deferred payments are all concerned with general principles. Thus in the area of contracts, Qur'anic legislation is confined to the bare minimum of detail. Of the two *āyāt* on the subject of contracts, one is in the form of a command and the other in the form of a question as follows: 'O you who believe, fulfil your undertakings' (al-Mā'idah, 5:1)

يا أيها الذين آمنوا أوفوا بالعقود

and 'O you who believe, why do you say things which you do not carry through?' (al-Saff, 61:2)

يا أيها الذين آمنوا لم تقولون ما لا تفعلون

The substance of these *āyāt* has been confirmed in two other short passages as follows: 'And fulfil the promise; surely the promise will be enquired into'

وأوفوا بالعهد إن العهد كان مسئولا

and 'O you who believe, fulfil your undertakings' (al-Mā'idah, 5:1).

يا أيها الذين ءامنوا أوفوا بالعقود

In yet another *āyah* (al-Nisā', 4:58) the Qur'ān stresses the fulfilment of trust and the principle of fair treatment: 'God commands you to turn over trusts to whom they belong and when you judge among people, judge with justice'.

إن الله يأمركم أن تؤدوا الأمانات إلى أهلها وإذا حكمتم بين الناس أن تحكموا بالعدل

Contracts must not, therefore, overrule the principles of morality and justice, and the faithful fulfilment of trusts. In the area of civil transactions and property, the believers are enjoined to 'devour not the properties of one another unlawfully, but let there be lawful trade by mutual consent' (al-Nisā', 4:29).

يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراضٍ منكم

Elsewhere we read in sūra al-Baqarah (2:275) that 'God has permitted sale and prohibited usury'.

وأحل الله البيع وحرم الربا

The detailed varieties of lawful trade, the forms of unlawful interference with the property of others, and the varieties of usurious transactions, are matters on which the Qur'ān has not elaborated. Some of these have been explained and elaborated by the *Sunnah*. As for the rest, it is for the scholars and the *mujtahidūn* of every age to specify them in the light of the general principles of the *Shari'ah* and the needs and interests of the people.²⁴

In the sphere of crimes and penalties, Qur'ānic legislation is specific with regard to only five offences, namely murder, theft, highway robbery, *zinā* and slanderous accusations. As for the rest, the Qur'ān authorises the community and those who are in charge of their affairs (i.e. the *ulū al-amr*) to determine them in the light of the general principles of *Shari'ah* and the prevailing conditions of society. Once again the Qur'ān lays down the broad principles of penal law when

it states that 'the punishment of an evil is an evil like it' (al-Shūrā, 42:40),

وجزاء سيئة سيئة مثلها

and 'when you decide to punish, punish in proportion to the offence committed against you' (al-Nahl, 16:126).

وإن عاقبتهم فعاقبوا بمثل ما عوقبتم به

In the area of international relations, the Qur'ān lays down rules that regulate war with the unbelievers and expounds the circumstances in which their property may be possessed in the form of booty. But the general principle on which relations between Muslims and non-Muslims are to be regulated is stated in the following passage:

God does not forbid you to act considerately towards those who have never fought you over religion nor evicted you from your homes, nor [does he forbid you] to act fairly towards them. God loves the fair-minded. He only forbids you to be friendly with the ones who have fought you over [your] religion and evicted you from your homes and have abetted others in your eviction. Those who befriend them are wrongdoers (al-Mumtahinah, 60:8-9).

لا ينهاكم الله عن الذين لم يقاتلوكم في الدين ولم

يخرجوكم من دياركم أن تبرؤهم وتقسطوا إليهم إن

الله يحب المقسطين. إنما ينهاكم الله عن الذين قاتلوكم

في الدين وأخرجوكم من دياركم وظاهروا على

إخراجكم أن تولوهم ومن يتولهم فأولئك هم الظالمون.

Similarly, the Qur'ānic commandments to do justice are confined to general guidelines and no details are provided regarding the duties of the judge or the manner in which testimony should be given.²⁵ On the principles of government, such as consultation, equality and the rights of citizens, the Qur'ān does not provide any details. The general principles are laid down, and it is for the community, the '*ulamā'*' and leaders to organise their government in the light of the changing conditions of society.²⁶ The Qur'ān itself warns the believers

against seeking the regulation of everything by the express terms of divine revelation, as this is likely to lead to rigidity and cumbersome restrictions: 'O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you' (5:101).

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَسْأَلُوا عَنْ أَشْيَاءَ إِنْ تَبَدَّلَ لَكُمْ تَسْوَكُم

In this way, the Qur'ān discourages the development of an over-regulated society. Besides, what the Qur'ān has left unregulated is meant to be devised, in accordance with the general objectives of the Lawgiver, through mutual consultation and *ijtihād*. A careful reading of the Qur'ān further reveals that on matters pertaining to belief, the basic principles of morality, man's relationship with his Creator, and what are referred to as *ghaybiyyāt*, that is transcendental matters that are characteristically unchangeable, the Qur'ān is clear and detailed, as clarity and certainty are necessary requirements of belief. In the area of ritual performances ('*ibādāt*') such as *ṣalāh*, fasting and *hajj*, on the other hand, although these too are meant to be unchangeable, the Qur'ān is nevertheless brief, and most of the necessary details have been supplied by the *Sunnah*. An explanation for this is that ritual performances are all of a practical, or '*amālī*', nature and require clear instructions which are best provided through practical methods and illustration. With regard to *ṣalāh*, legal alms (*zakāt*) and *hajj*, for example, the Qur'ān simply commands the believers to 'perform the *ṣalāh* and pay the *zakāt*' (al-Baqarah, 2:43).

وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ

and states that 'pilgrimage to the House is a duty that God has imposed on mankind' (Al 'Imrān, 3:97).

وَلِلَّهِ عَلَى النَّاسِ حِجُّ الْبَيْتِ مَنْ اسْتَطَاعَ إِلَيْهِ سَبِيلًا

With regard to *ṣalāh*, the Prophet has ordered his followers to 'perform *ṣalāh* the way you see me performing it'

صَلُّوا كَمَا رَأَيْتُمُونِي أُصَلِّي

and regarding the *hajj* he similarly instructed people to 'take from me the rituals of the *hajj*'.³⁷

خَلُّوا عَنِّي مَنَاسِكُكُمْ.

The details of *zakāt*, such as the quorum, the amount to be given and its numerous other conditions, have been supplied by the *Sunnah*.

The Qur'ān also contains detailed rules on family matters, the prohibited degrees of relationship in marriage, inheritance and specific punishments for certain crimes. These rules have a devotional (*ta'abbudī*) aspect and are part of the '*ibādāt*'. They are also associated with human nature and regulate the manner in which man's natural needs may be fulfilled. The basic objectives of the law regarding these matters are permanent. They are, however, matters that lead to disputes. The purpose of regulating them in detail is to prevent conflict among people. The specific rulings of the Qur'ān in these areas also took into consideration the prevalence of certain entrenched social customs of Arabia, which were overruled and abolished. Qur'ānic reforms concerning the status of women, and its rules on the just distribution of property within the family could, in view of such customs, only be effective if couched in clear and specific detail.³⁸

The Qur'ān frequently provides general guidelines on matters of law and religion, which are often specified by the Qur'ān itself; otherwise the *Sunnah* specifies the general in the Qur'ān and elaborates its brief and apparently ambiguous provisions. By far the larger part of Qur'ānic legislation is conveyed in general terms which need to be specified in relation to particular issues. This is partly why we find that the study of the '*āmm*' (general) and *khāṣṣ* (particular) acquires a special significance in the extraction of substantive legal rules from the general provisions of the Qur'ān. Once again the fact that legislation in the Qur'ān mainly occurs in brief and general terms has to a large extent determined the nature of the relationship between the Qur'ān and *Sunnah*. Since the general, the ambiguous and the difficult portions of the Qur'ān were in need of elaboration and *takhṣīs* (specification), the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the Qur'ān. It was due to these and other such factors that a unique relationship was forged between the *Sunnah* and the Qur'ān in that the two are often integral to one another and inseparable. By specifying the general and by clarifying the *mujmal* in the Qur'ān, the *Sunnah* has undoubtedly played a crucial role in the development of *Shari'ah*. It is the clear and the specific (*khāṣṣ*) in the Qur'ān and *Sunnah* which provides the core and kernel of the *Shari'ah* in the sense that no law can be said

to have any reality if all or most of it were to consist of brief and general provisions. To that extent, the specifying role of the *Sunnah* in its relationship to the Qur'ān is of central importance to *Shari'ah*, and yet the general in the Qur'ān has a value of its own. In it lies the essence of comprehensive guidance and of the permanent validity of the Qur'ān. It is also the *'umm* of the Qur'ān that has provided scope and substance for an ever-continuing series of commentaries and interpretations. The *'ulamā'* and commentators through the centuries have attempted to derive a fresh message, a new lesson or a new principle from the Qur'ān that was more suitable to the realities of their times and the different phases of development in the life of the community. This was to a large extent facilitated by the fact that the Qur'ān consisted for the most part of broad principles which could be related to a variety of circumstances. To give one example, on the subject of consultation (*shūrā*) the Qur'ān contains only two *āyāt*, both of which are general. One of these commands the Prophet to 'consult them [the community] in their affairs' (Al 'Imrān, 3:159)

وشاورهم في الأمر

and the other occurs in the form of praise for the Muslim community on account of the fact that 'they conduct their affairs by consultation among them' (al-Shūrā, 42:38).

وأمرهم شورى بينهم

The fact that both of these are general proclamations has made it possible to relate them to almost any stage of development in the socio-political life of the community. The Qur'ān has not specified the manner of how the principle of *shūrā* should be interpreted; it has not specified any subject on which consultation must take place, nor even any person or authority who should be consulted. These are all left to the discretion of the community. In its capacity as the vicegerent of God and the locus of political authority, the community is at liberty to determine the manner in which the principle of *shūrā* should be interpreted and enforced.³⁹

I.3 The Five Values

As a characteristic feature of Qur'ānic legislation, it may be stated here that commands and prohibitions in the Qur'ān are expressed in a

variety of forms which are often open to interpretation and *ijtihad*. The question of whether a particular injunction in the Qur'ān amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text. The subject of commands and prohibitions need not be elaborated here as this is the theme of a separate chapter of this work. It will suffice here to note the diversity of Qur'ānic language on legislation. Broadly speaking, when God commands or praises something, or recommends a certain form of conduct, or refers to the positive quality of something, or when it is expressed that God loves such-and-such, or when God identifies something as a cause of bounty and reward, all such expressions are indicative of the legality (*mashrū'iyyah*) of the conduct in question, which partakes of the obligatory and commendable. If the language of the text is inclined on the side of obligation (*wujūb*), such as when there is a definite demand or a clear emphasis on doing something, the conduct in question is obligatory (*uājib*), otherwise it is commendable (*mandūb*).

Similarly, when God explicitly declares something permissible (*halāl*) or grants a permission (*idhn*) in respect of doing something, or when it is said that there is 'no blame' or 'no sin' accrued from doing something, or when God denies the prohibition of something, or when the believers are reminded of the bounty of God in respect of things that are created for their benefit,⁴⁰ all such expressions are indicative of permissibility (*ibāhah*) and the right to choose (*takhyir*) in respect of the conduct or the object in question.

Whenever God demands the avoidance of a certain conduct, or when He denounces a certain act, or identifies it as a cause for punishment, or when a certain kind of conduct is cursed and regarded as the work of Satan, or when its harmful effects are emphasised, or when something is proclaimed unclean, a sin or a deviation (*ithm*, *fiṣq*) – all such expressions are indicative of prohibition (*tahrim*) or abomination (*karāhah*). If the language is explicit and emphatic in regard to prohibition, the conduct or object in question becomes *harām*, otherwise it is reprehensible, or *makrūh*. It is for the *mujtahid* to determine the precise value of such injunctions in the light of both the language of the text and the general objectives and principles of the *Shari'ah*.⁴¹

This style of Qur'ānic legislation, and the fact that it leaves room for flexibility in the evaluation of its injunctions, is once again in harmony with the timeless validity of its laws. The Qur'ān is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Qur'ān may sometimes imply an

obligation, a recommendation or mere permissibility. The Qur'an does not employ the categories known as the five values (*al-ahkām al-khamsah*) which the *fuqahā'* have attempted to specify in juristic manuals. When an act is evaluated as obligatory, it is labelled *fard* or *wājib*; when it is absolutely forbidden, it is evaluated as *harām*. The shades of values which occur between these two extremes are primarily religious in character and provide a yardstick that can be applied to any type of human conduct. But only the two extremes, namely the *wājib* and *harām*, incorporate legal commands and prohibitions. The rest are largely non-legal and non-justiciable in a court of law. The Qur'an thus leaves open the possibility, although not without reservations, of enacting into *harām* what may have been classified by the *fuqahā'* of one age as merely reprehensible, or *maknūh*. Similarly, the recommendable, or *mandūb*, may be elevated to a *wājib* if this is deemed to be in the interest of the community in a different stage of its experience and development.

I.4 Ratiocination (*Ta'lil*) in the Qur'an

Literally *ta'lil* means 'causation', or a 'search for the causes', and refers to the logical relationship between cause and effect. But the '*ulamā'* of jurisprudence tend to use *ta'lil* and its derivative, '*illah*, for different purposes. In its juridical usage, '*illah* (effective cause) does not exactly refer to a causal relationship between two phenomena; it means rather the *ratio* of the law, its value and its purpose. Broadly speaking, '*illah* refers to the rationale of an injunction, and in this sense, it is synonymous with *hikmah*, that is, the purpose and the objective of the law. But there is a difference between '*illah* and *hikmah* which I shall discuss in a subsequent chapter on analogical deduction (*qiyās*). There is another Arabic word, namely *sabab*, which is synonymous with '*illah*, and the two are often used interchangeably. Yet the '*ulamā'* of *uṣūl* tend to use *sabab* in reference to devotional matters ('*ibādāt*) and use '*illah* in all other contexts. Thus it is said that the arrival of Ramaḍān is the cause (*sabab*) of fasting but that intoxication is the '*illah* of the prohibition in wine-drinking.¹²

'*Illah* and *sabab* also differ in that '*illah* signifies the immediate cause where *sabab* may be intermediate. In reference, for example, to drawing water from a well, if a rope is used, the rope would be the *sabab* whereas the act of drawing is the '*illah* of getting water from the well. Similarly, when a man says to his employee 'you are dismissed', the words that are uttered are the '*illah* of dismissal. But if it is said 'you

are dismissed if you leave this house' and then he leaves, the words uttered would be the *sabab*, and the more immediate factor, which is the act of leaving the house, would be the '*illah*.

The authority of the Qur'an as the principal source of the *Shari'ah* is basically independent of ratiocination. The believers are supposed to accept its rulings regardless of whether they can be rationally explained. Having said this, however, there are instances where the Qur'an justifies its rulings with reference to the benefits that accrue from them, or the objectives they may serve. Such explanations are often designed to make the Qur'an easier to understand. To give an example in the context of encounters between members of opposite sexes, the believers are enjoined in sūra al-Nūr (24:30) 'to avert their glances and to guard their private parts'.

يغضوا من أبصارهم ويحفظوا فروجهم

The text then goes on to provide that in doing so they will attain greater chastity of character and conduct. To give another example, in sūra al-Ḥashr (59:7) the Qur'an regulates the distribution of booty among the needy, the orphans and the wayfarers 'so that wealth does not merely circulate among the wealthy'.

كي لا يكون دولة بين الأغنياء منكم

In the first *āyah*, averting the glance is justified as it obstructs the means to promiscuity and *zinā*. The ruling in the second *āyah* is justified as it prevents the accumulation of wealth in few hands. Similarly, the Qur'an specifies the rationale of its law in the following instances:

And there is life for you in retaliation, O men of understanding (al-Baqarah, 2:179).

ولكم في القصاص حياة يا أولى الألباب

Take alms out of your property so as to cleanse and purify them thereby (al-Tawbah, 9:103).

خذ من أموالهم صدقة تطهرهم

And fight them until there is no persecution and God's religion prevails (al-Baqarah, 2:191).

وَقَاتِلُوهُمْ حَتَّى لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ لِلَّهِ

And prepare for them as far as you can of strength including steeds of war so as to frighten the enemies of God and your enemies (al-Anfāl, 8:66).

وَأَعِدُوا لَهُمْ مَا اسْتَطَعْتُمْ مِنْ قُوَّةٍ وَمِنْ رِبَاطِ الْخَيْلِ تُرْهَبُونَ
بِهِ عَدُو اللَّهِ وَعَدُوكُمْ

Even in the spheres of beliefs and *ibādāt* we find, for example, the following instances of *ta'lil*:

Truly *salāh* prevents from immorality and evil (al-Ankabūt, 29:45).

إِنْ الصَّلَاةُ تَنْهَى عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ

[We sent] messengers who give good news as well as warnings so that the people should have no plea against God after the [sending of] messengers (al-Nisā', 4:165).

رَسُولًا مُبَشِّرِينَ وَمُنْذِرِينَ لِئَلَّا يَكُونَ لِلنَّاسِ
عَلَى اللَّهِ حِجَّةٌ بَعْدَ الرِّسَالِ

We also find similar passages in the Qur'ān concerning the fasting of Ramaḍān (al-Baqarah, 2:138) and the pilgrimage of *hajj* (al-Hajj, 22:27) where references are made to the benefits of observing them. Whereas the foregoing are instances in which the text explicitly states the *'illah* of the injunctions concerned, on numerous other occasions the jurists have identified the *'illah* through reasoning and *ijtihad*. The identification of *'illah* in many of the following cases, for example, is based on speculative reasoning on which the *'ulamā'* are not unanimous: that arrival of the specified time is the cause (*sabab* or *'illah*) of the prayer; that the month of Ramaḍān is the cause of fasting; that the existence of the Ka'bah is the cause of *hajj*; that owning property is the cause of *zakāt*; that theft is the cause of amputation of the hand; that travelling is the cause of shortening the prayer and that intentional killing is the cause of retaliation. These and other similar conclusions with regard to the assignment of *'illah* have been drawn in the light of supportive evidence in the Qur'ān and *Sunnah*, but even so many of them are disputed by the *'ulamā'*. These examples will in the meantime serve to show the difference between the literal/logical meaning of *'illah* and its juridical usage among the *'ulamā'* of jurisprudence.⁴³

The question arises as to whether the incidence of *ta'lil* in the Qur'ān gives the *mujtahid* the green light to enquire into the causes and reasons behind its injunctions, or whether it exists simply to facilitate a better understanding of the text. The *'ulamā'* have held different views on this issue. The opponents of *ta'lil* maintain that divine injunctions embodied in the clear text have no causes unless the Lawgiver provides us with clear indications to the contrary. Thus it would not only be presumptuous on the part of the *mujtahid* to adopt an inquisitive approach to divine injunctions, but searching for the cause (*'illah*) or the objective *hikmah* of the Qur'ānic rules amounts to no more than an exercise in speculation. Besides, the opponents of *ta'lil* have argued that the believer should surrender himself to the will of God, which can best be done through unquestioning acceptance of God's injunctions. To look into the motive, purpose and rationale of such injunctions, and worse still, to accept them on their rational merit, is repugnant to sincerity in submission to God. Furthermore, in his attempt to identify the rationale of an injunction, the *mujtahid* can only make a reasonable guess which cannot eliminate the possibility of error. There may even be more than one cause or explanation for a particular ruling of the Qur'ān, in which case one cannot be certain which of the several causes might be the correct one. This is the view of the *Zāhirīs*. We may ask: what is the proper *'illah*, for example, of the expiation of feeding ten poor persons in the event of taking false oath: to help the poor, to punish the rich, to fight hunger, or to endure a fair distribution of wealth in the community?

The majority of *'ulamā'* have, however, held that the *ahkām* of the *Shari'ah* work towards certain objectives, and when these can be identified, it is not only permissible to pursue them but it is our duty to make an effort to identify and implement them. Since the realisation of the objectives (*maqāsid*) of the *Shari'ah* necessitates identification of the cause/rationale of the *ahkām*, it becomes our duty to discover these in order to be able to pursue the general objectives of the Lawgiver.⁴⁴ Thus it is the duty of the *mujtahid* to identify the proper causes of divine injunctions, especially in the event where more than one *'illah* can be attributed to a particular injunction. The majority view on *ta'lil* takes into account the analysis that the rules of *Shari'ah* have been introduced in order to realise certain objectives and that the Lawgiver has enacted the detailed rules of *Shari'ah*, not as an end in themselves, but as a means to realising those objectives. In this way, any attempt to implement the law should take into account not only

the externalities of the law but also the rationale and the intent behind it. Thus when a man utters the credo of Islam to achieve worldly gain or to attain social prestige, his confession is not valid. The reason for this is that the true purpose of confession to the faith is the exaltation and worship of God, and if this is violated, a formal confession is of no value. Similarly, if a man says a prayer for the sake of display and self-commendation, it is not valid. The real purpose and value of the law is therefore of primary importance, and indeed it is necessary that the *mujtahid* identifies it so as to be able to implement the law in accordance with its purpose. The Qur'an admittedly requires unquestioning obedience to God and to His Messenger, but at the same time, it exhorts men to understand the spirit and purpose of God's injunctions. Time and time again, the Qur'an invites the believers to rational enquiry, as opposed to blind imitation, in the acceptance of its messages.⁴⁵

Ta'lil acquires a special significance in the context of analogical deduction. *'Illah* is an essential requirement, indeed the *sine qua non* of analogy. To enable the extension of an existing rule of the *Sharī'ah* to similar cases, the *mujtahid* must establish a common *'illah* between the original and the new case. Without the identification of a common *'illah* between two parallel cases, no analogy can be constructed. To this it may be added that there is a variety of *qiyās*, known as *qiyās mansūṣ al-'illah*, or *qiyās* whose *'illah* is indicated in the *nass*, in which the *'illah* of the law is already identified in the text. When the *'illah* is so identified, there remains no need for the *mujtahid* to establish the effective cause of the injunction by recourse to reasoning or *ijtihād*. However, this variety of *qiyās* is limited in scope when it is compared to *qiyās* whose *'illah* is not so indicated on the *nuṣūṣ*. It thus remains true to say that *ta'lil*, that is the search for the effective causes of the *Sharī'ah* rules, is of central importance to *qiyās*. Further discussion on the *'illah* of analogy, the manner of its identification, and rules which govern the propriety of *ta'lil* in *qiyās* can be found in our discussion of *qiyās* in a separate chapter below.

There seems to be a confusion on the part of the opponents of *ta'lil* about the purpose and nature of *ta'lil*. The opponents of *ta'lil* seem to have perceived this phenomenon as a sign of impudence and impropriety in regard to belief. In reality, however, this need not be the case. One may attempt *ta'lil* while remaining totally faithful to the divine origin and essence of the Qur'an. To exercise *ta'lil* does not lessen either the binding power or the holiness of the divine injunctions. We may, for example, offer various interpretations of the

cause of performing the *ṣalāh* or of giving *zakaḥ*; but whether we can understand the reason or not, *ṣalāh* and *zakaḥ* are still obligatory upon Muslims.

1.5 Inimitability (*I'jāz*) of the Qur'an

The Qur'an is believed to be the miracle of Muḥammad, the proof of his prophethood and a testimony to its divine origin. But what exactly constitutes this miracle is a question that has engaged Muslim thinkers for generations. It is widely believed that the inimitability of the Qur'an is reflected in at least four aspects of the Qur'an. First, in its linguistic excellence: many scholars have pointed out that there exists no piece of Arabic literature that can match the literary excellence of the Qur'an with respect to both content and form.⁴⁶ It is neither poetry nor prose; its rhythm, its genre and word structure are unique. It is the spiritual miracle of the prophethood of Muḥammad, who never learned to read or write, and it was considered far beyond his own ability to produce a linguistic artefact of this kind. In more than one place, the Qur'an challenges those who deny its divine origin by asking them to produce anything to match it.⁴⁷

The vast majority of scholars have associated *i'jāz* with the sublime style of Qur'an, and many have also highlighted the content and meaning of the Holy Book. The view has thus prevailed that inimitability is the combined outcome of both meaning and wording which the Qur'an manifests in the highest form of perfection. The style and rhythm of the Qur'an generate a psychological effect which makes it inimitable. It is also added that *i'jāz* is a function of the insuperable manner in which Qur'anic discourse binds meaning, wording and various literary styles, all of which are conducive to its special psychological effect. The all-knowing tone of its speech, its beautiful rhythm and its spirituality are yet other aspects of that total effect that is called *i'jāz*.

The second aspect of *i'jāz* in the Qur'an is its narration of events which took place centuries ago. The accuracy of the Qur'anic narratives concerning such events is generally confirmed by historical evidence.⁴⁸

The third aspect of *i'jāz* in the Qur'an is its accurate prediction of future events, such as the victory of the Muslims in the battle of Badr (al-Anfāl, 8:7), the conquest of Mecca (al-Fath, 48:27) and the eventual defeat of the Persians by the Roman empire: 'The Romans were defeated in a land nearby, but even after this defeat, they will

be victorious in a few years [*fī biḍʿa sinīn*, literally in a period lasting up to ten years]' (al-Rūm, 30:2-4).

غلبت الروم في أدنى الأرض وهم من بعد غلبهم سيغلبون
في بضع سنين

The Romans were defeated by the Persians when the latter took Jerusalem in 614 AD. But the Persians were later defeated when the Romans won the battle of Issus in 622.⁴⁹

The fourth aspect of *iʿjāz* in the Qurʾān is manifested in its scientific truth concerning the creation of man, the earth and the planetary system. The tenets thus inform us that:

We created man from an extract of clay, then We placed him as a drop of semen in a secure resting-place. Then We turned the drop into a clot; next We turned the clot into tissue; and then We turned the tissue into bones and clothed the bones with flesh (al-Muʾminūn, 23:11-14)

ولقد خلقنا الإنسان من سلالة من طين ثم جعلناه نطفة
في قرار مكين ثم خلقنا النطفة علقه فخلقنا العلقه مضغة
فخلقنا المضغة عظاما فكسونا العظام لحما

the earth and the heavens were of one piece, then We parted them (al-Anbiyāʾ, 21:30)

إن السموات والأرض كانتا رتقا ففتقناهما

all life originated in water (al-Anbiyāʾ, 21:30)

وجعلنا من الماء كل شيء حي

the universe consisted of fiery gas (Hā-Mīm, 41:11)

السماء وهي دخان

that fertilisation of certain plants is facilitated by the wind (al-Hijr, 15:22)

وأرسلنا الرياح لواقح

Another manifestation of *iʿjāz* in the Qurʾān is seen in its humanitarian, legal and cultural reforms, which were unprecedented in the history of nations. Thus in the sphere of government, the ruler and the ruled were both equally subjected to adjudication under the rule of law.⁵⁰ In the area of civil transactions and commerce, the Qurʾān established mutual agreement as the norm and essence of all contracts. The principal Qurʾānic reform in the area of property was the introduction of the doctrine of *istikhlāf*. The Qurʾān declares that all property belongs to God, and that man, in his capacity as the vicegerent of God, is a mere trustee whose exercise of the right of ownership is subject to the benefit or *maṣlahah* of society as supervised by the government. In the sphere of international relations, treaty relations, the conduct of war and treatment of prisoners of war, were all regulated by a set of principles which aimed at the realisation of justice and respect for human dignity. Relations among individuals were to be governed by the principles of freedom and equality, and the state was equally subject to the observance, and indeed the protection, of these values.⁵¹

1.6 The Occasions of Revelation (*Asbāb al-Nuzūl*)

Asbāb al-nuzūl deal with the phenomenology of the Qurʾān, and explain the events that are related to the revelation of particular passages. The best-known *asbāb al-nuzūl* have been related to us by reliable Companions. One condition for the reliability of such reports is that the person relating should have been present at the time or the occasion relevant to a particular passage. The authenticity of such reports is subject to the same rules as those applied to *ḥadīth* in general. In this way, reports from the Successors (*ṭābiʿūn*) only, which do not go back to the Prophet and his Companions, are considered to be weak (*ḍaʿīf*).⁵²

The knowledge of *asbāb al-nuzūl* is necessary for anyone who wishes to acquire more than a superficial knowledge of the Qurʾān, and there are at least two main reasons for this. One is that knowledge of words and concepts is incomplete without knowledge of context and the nature of an audience. For one form of speech – a question for example – may also convey other meanings such as elucidation, surprise, or reprimand, etc. Similarly, a command may signify mere

permissibility, a recommendation, or a threat, etc., depending on the circumstances in which it is issued and the nature of the audience. An incidental meaning or a shade of expression may at times reflect the main purpose of a particular text and this cannot be known without the knowledge of *asbāb al-nuzūl*. Ignorance of *asbāb al-nuzūl* may thus lead to the neglect or misunderstanding of a part or even the whole of an injunction.⁵³ Secondly, ignorance of *asbāb al-nuzūl* may lead to unwarranted disagreement and even conflict, for the Qur'an comprises some passages which contain probability (*ṣāḥir*) and ambiguity (*mujmal*). Such instances in the text can be clarified by reference to the circumstances in which they were revealed. It is reported that in a conversation with 'Abd Allāh ibn 'Abbās, 'Umar ibn al-Khaṭṭāb asked him: 'Why should there be disagreement among this *umma*, all of whom follow the same Prophet and pray in the direction of the same *qiblah*?' To this Ibn 'Abbās replied, 'O Commander of the Faithful, the Qur'an was sent down to us, we read it and we know the circumstances in which it was revealed. But there may be people after us who will read the Qur'an without knowing the occasions of its revelation. Thus they will form their own opinion, which might lead to conflict and even bloodshed among them.'

'Umar disagreed with Ibn 'Abbās for saying so at first but, when the latter departed, 'Umar pondered over what he had said. He then sent for Ibn 'Abbās to tell him that he agreed with his view.⁵⁴ It has been observed that by making this remark, Ibn 'Abbās was referring to certain misinterpretations of the Qur'an that had occurred owing to ignorance of *asbāb al-nuzūl*. In particular, some Qur'anic passages had been revealed concerning the unbelievers, but were taken by some commentators to be of general application to Muslims and non-Muslims alike. There were also passages in the Qur'an which were revealed in reference to the conduct of people who had died before the revelation of certain rulings, and yet these were taken by some commentators to be of general application.⁵⁵

Furthermore, the knowledge of *asbāb al-nuzūl* is informative of the conditions of Arab society at the time. Their customary linguistic usages and their nuances of expression were naturally reflected in the Qur'an. The peculiarities of Arab social customs often gave exegeses of the Qur'anic text a perspective and offered solutions to some of the doubts or ambiguities that would otherwise be difficult to understand. The *asbāb al-nuzūl* are fully cognisant of the customary practices of Arab society and the relationship, if any, of such practices to Qur'anic legislation. To give an example, the Qur'anic *āyah* 'Our

Lord condemn us not, if we forget or make a mistake' (al-Baqarah, 2:286)

ربنا لا تؤاخذنا إن نسينا أو أخطأنا

is thought to refer to unbelief, that is, when words that express unbelief are uttered inadvertently. This is forgiven, just as words of unbelief that are expressed under duress are forgiven. However, the exemption here is not extended to similar pronouncements, such as statements of divorce, freeing of a slave, or sale and purchase, for freeing a slave was not known in the custom of the Arabs nor were inhibitions over oath-taking (*aymān*). The general support of this *āyah* is thus given a concrete application in the light of prevailing custom.⁵⁶

NOTES

1. The Qur'an also calls itself by alternative names, such as *kitāb*, *hudā*, *funqān*, and *dhikr* (Book, Guide, Distinguisher, and Remembrance respectively). When the definite article, *al*, is prefixed to the Qur'an, it refers to the whole of the Book; but without this prefix, the Qur'an can mean either the whole or a part of the Book. Thus one may refer to a singular *sūra* or *āyah* thereof as the Qur'an, but not as al-Qur'an.

2. Hughes, *Dictionary*, pp. 485ff; von Denffer, 'Ullām, pp. 68ff.

3. Shaltūt, *al-Islām*, pp. 499-500; Qatān, *Tashrīf*, p. 83; Badrān, *Uṣūl*, p. 72.

4. Khallāf, 'Ilm, p. 23; Abdur Rahim, *Jurisprudence*, p. 69; Abū Zahrah, 'Uṣūl, p. 59.

5. For an exclusive treatment of words of foreign origin in the Qur'an see Shawkālī, *Inḥād*, pp. 22ff. See also Ghazālī, *Mustafā*, I, 68.

6. This report is attributed to a Nūh ibn Maryam who has confirmed that Abū Ḥanīfah changed his initial ruling. See Abū Zahrah, 'Uṣūl, p. 60; Shaltūt, *al-Islām*, p. 478; Šabūnī, *Madkhal*, p. 4.

7. Šabūnī, *Madkhal*, pp. 41-42; Abū Zahrah, 'Uṣūl, p. 61; Qatān, *Tashrīf*, pp. 57ff.

8. Ghazālī, *Mustafā*, I, 64; Shawkālī, *Inḥād*, p. 30; Shaltūt, *al-Islām*, p. 440. The same would apply to the two other instances of variant readings which are attributed to 'Abd Allāh ibn Mas'ūd concerning the punishment of theft, and the form of divorce which is known as *ilā'* in *sūra al-Mā'idah* (5:38) and al-Baqarah (2:226) respectively. Since these are only supported by solitary reports (*āḥād*) they do not constitute a part of the Qur'an.

9. Ismā'il, *Maṣādir*, pp. 67ff.

10. Abū Zahrah, 'Uṣūl, p. 62; Abdur Rahim, *Jurisprudence*, p. 71.

11. To be precise, the Meccan period lasted twelve years, five months and thirteen days, and the Medinan period, nine years, seven months and seven days.

12. Cf. Šabūnī, *Madkhal*, pp. 41-4; Khallāf, 'Ilm, p. 24.

13. Cf. von Denffer, 'Ullām, p. 90.

14. *Ibid.*, p. 91.

15. Cf. Qaṣṣān, *Tashrīf*, pp. 69–70.
16. Cf. Abdur Rahim, *Jurisprudence*, p. 71.
17. Shalūtī, *al-Isām*, p. 494; Khallāf, *Ilm*, pp. 32–3.
18. Note, for example, Ghazālī, who estimates the *āyāt al-ahkām* at 500. While commenting on Ghazālī's estimate, Shawkātī, on the other hand, observes that any such calculation can only amount to a rough estimate (*Muṣṭafā*, II, 101 and Shawkātī, *Inshād*, p. 250).
19. Khallāf, *Ilm*, p. 35; Abū Zahrah, *Uṣūl*, p. 71.
20. Sha'ban, 'Manhaj', p. 31.
21. A typical form of a sinful oath is when a person takes an oath on the truth of something which he knows to be untrue; this is called *yamin al-ghamūs*, which is a variety of *yamin al-mi'āqadāh*. However, the Hanafis maintain that the latter only refers to the situation where a person pledges to do something in the future but then refuses to fulfil it. He is then liable to pay the *kaffārāh*.
22. Badrān, *Uṣūl*, p. 66.
23. Shalūtī, *al-Isām*, p. 498.
24. Shāṭibī, *Muwāfaqāt*, III, 9; Qaṣṣān, *Tashrīf*, p. 82.
25. Shāṭibī, *Muwāfaqāt*, III, 9.
26. Ibid., III, 12.
27. Shalūtī, *al-Isām*, pp. 498–99, Abū Zahrah, *Uṣūl*, p. 71; Khallāf, *Ilm*, p. 35; Badrān, *Uṣūl*, p. 67.
28. Abū Zahrah, *Uṣūl*, p. 80, where he quotes Ibn Hazm in support of his own view.
29. Shāṭibī, *Muwāfaqāt*, III, 219.
30. Abū Zahrah, *Uṣūl*, p. 70.
31. Šābūnī, *Muhādharāt*, p. 31. For a further discussion of this *āyah* see below in the sections of this work on the *hujjiyyah* of *Sunnah*, *ijmā'* and *qiyās* respectively.
32. Shāṭibī, *Muwāfaqāt*, III, 217.
33. Ismā'il, *Maṣādir*, p. 131.
34. Cf. Badrān, *Bayān*, p. 2–3.
35. Shalūtī, *al-Isām*, p. 501.
36. Šābūnī, *Madkhal*, p. 73.
37. Shāṭibī, *Muwāfaqāt*, III, 178; Abū Zahrah, *Uṣūl*, p. 122; Khallāf, *Ilm*, p. 167.
38. Cf. Šābūnī, *Madkhal*, p. 72; Badrān, *Bayān*, p. 4.
39. Cf. Sha'ban, 'Manhaj', p. 29.
40. Note, for example, 'And He created for you ships and cattle on which you ride' (al-Zukhruf, 43:12), and 'He created cattle from which you derive warmth [...] and you eat of their meat' (al-Nahl, 16:5); and 'Say, who has forbidden the beautiful gifts of God which He has produced for His servants, and the good things which He has provided?' (al-A'raf, 7:32).
41. Cf. Sha'ban, 'Manhaj', pp. 22–3.
42. Cf. Ahmad Hasan, 'Rationality', p. 101.
43. Ibid., p. 104.
44. Ibn Hazm, *Ihkām*, VIII, pp. 76ff; Šābūnī, *Madkhal*, p. 75. For further discussion on *ta'īl* in the Qur'an see the section on *qiyās* below where *ta'īl* is discussed in connection with the 'illah of *qiyās*.
45. Cf. Ahmad Hasan, 'Rationality', 102.

46. Note for example sūra al-Baqarah (2:23) which reads: 'If you are in any doubt about what We have sent to Our servant, then bring a chapter like it and call in your witnesses beside God, if you are truthful.'
47. Abū Zahrah, *Uṣūl*, p. 65; Šābūnī, *Madkhal*, p. 45.
48. Von Denffer, 'Uṣūl', p. 152.
49. For further details on *ijāz* see von Denffer, 'Uṣūl', pp. 152–7; Abū Zahrah, *Uṣūl*, p. 65–6; Khallāf, *Ilm*, pp. 25–7.
50. For further details on the principles of government under the rule of law – also referred to as the principle of legality – see Kamali, 'The Citizen and State', pp. 30ff.
51. Cf. Šābūnī, *Madkhal*, p. 46; Abū Zahrah, *Uṣūl*, p. 67; Kamali, 'The Citizen and State', pp. 31ff.
52. Von Denffer, 'Uṣūl', pp. 93ff.
53. Shāṭibī, *Muwāfaqāt*, III, p. 201.
54. Ibid., p. 202.
55. Khudari, *Uṣūl*, pp. 209–210. Thus when Qudamah ibn Maz'ūn was charged with the offence of wine-drinking, 'Umar ibn al-Khaṭṭāb decided to punish him, but the defendant cited the Qur'anic *āyah* in sūra al-Mā'idah (5:93) in his own defence. This *āyah* reads: 'There is no blame on those who believe and do good deeds for what they consume provided they are God-fearing.' Ibn Maz'ūn claimed that he was one of them. 'Abd Allāh ibn 'Abbās refuted this view and explained that this particular *āyah* had been revealed concerning people who died before wine-drinking was definitively forbidden.
56. Ibid., p. 211.

CHAPTER THREE

The Sunnah

Introduction

Literally, *Sunnah* means a clear path or a beaten track but it is also used to imply normative practice, or an established course of conduct. A *Sunnah* may be a good example or a bad one, and it may be set by an individual, a sect or a community.¹ In pre-Islamic Arabia, the Arabs used the word '*Sunnah*' in reference to the ancient and continuous practices of the community that they inherited from their forefathers. Thus it is said that the pre-Islamic tribes of Arabia each had their own *sunnah*, which they considered the basis of their identity and pride.² The opposite of *Sunnah* is *bid'ah*, or innovation, which is characterised by lack of precedent and continuity with the past. In the Qur'an, the word '*Sunnah*' and its plural, *sunan*, have been used on a number of occasions (sixteen times to be precise). In all these instances, *Sunnah* has been used to imply an established practice or course of conduct. Typical occurrences of '*Sunnah*' in the Qur'an are '*sunnat al-awwalin*' (the worn-out ways of ancient people) (al-Kahf, 18:55), *sunnat Allāh* (God's way of practice of doing things) (al-Fath, 48:23 and al-Isrā', 17:77) and '*sunan*' (traditions, ways of life) (al-Imrān, 3:137). It is interesting to note that the phrase '*sunnat Allāh*' occurs in nine of the sixteen occasions. To the '*ulamā*' of *ḥadīth*, *Sunnah* refers to all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports which describe his physical attributes and character. The '*ulamā*' of jurisprudence, however, exclude the description of the physical features of the Prophet from the definition of *Sunnah*.³ *Sunnah al-Nabī* (or *Sunnah al-Rasūl*), that

is, the Prophetic *Sunnah*, does not occur in the Qur'an as such. But the phrase *uswah ḥasanah* (excellent conduct) which occurs in sūra al-Aḥzab (33: 21) in reference to the exemplary conduct of the Prophet is the nearest Qur'anic equivalent of *Sunnah al-Nabī*.⁴ The *uswah*, or example of the Prophet, was later interpreted to be a reference to his *Sunnah*. The Qur'an also uses the word '*ḥikmah*' (lit. wisdom) to indicate a source of guidance that accompanies the Qur'an itself. Al-Shāfi'i quotes at least seven instances in the Qur'an where '*ḥikmah*' occurs next to *al-kitāb* (the Book). In one of these passages, which occurs in sūra al-Jum'ah (62:2), for example, we read that God Almighty sent a Messenger to educate and to purify the people by 'teaching them the Book and the *ḥikmah*'.

هو الذي بعث في الأميين رسولا منهم يتلوا عليهم آياته
ويزكّيهم ويعلمهم الكتاب والحكمة

According to al-Shāfi'i's interpretation, which also represents the view of the majority, the word '*ḥikmah*' in this context means the *Sunnah* of the Prophet. The Book is clearly the Qur'an, and this is succeeded by '*ḥikmah*' in a context where God Most High mentions His favour to His creatures. The Qur'an has in numerous places emphasised obedience to the Prophet, so it would appear most likely that '*ḥikmah*' refers to the *Sunnah* of the Prophet.⁵ Both the terms '*Sunnah*' and '*Sunnah Rasūl Allāh*' have been used by the Prophet himself and his Companions. Thus when the Prophet sent Mu'adh ibn Jabal as judge to the Yemen, he was asked about the sources on which he would rely in making decisions. In reply Mu'adh referred first to the 'Book of God' and then to the '*Sunnah* of the Messenger of God'.⁶

لما أراد الرسول - صلى الله عليه وسلم - أن يعث
معاذ بن جبل إلى اليمن ، قال له : كيف تقضي إذا عرض
لك القضاء ؟ قال : أقضي بما في كتاب الله ، قال : فإن لم
تجد في كتاب الله ؟ قال : فبسنة رسول الله . قال : فإن لم
يكن في سنة رسول الله ؟ قال : أجتهد رأيي ولا ألو.

In another *ḥadīth*, the Prophet is reported to have said, 'I left two things among you. You shall not go astray so long as you hold on to them: the Book of God and my *Sunnah* [*sunnatī*].'⁷

تركت فيكم اثنين لن تضلوا ما تمسكتم بهما ؛ كتاب الله وسنتي.

There is evidence to suggest that the *Sunnah* of the Prophet was introduced into legal theory by the jurists of Iraq towards the end of the first century. The term '*Sunnah* of the Prophet' occurs, for example, in two letters addressed to the Umayyad ruler, 'Abd al-Malik ibn Marwān (d. 86 AH) by the Khārijite leader 'Abd Allāh ibn 'Ibād, and al-Ḥasan al-Basrī. But this might mean that the earliest available 'record on the establishment of terminology dates back to the late first century Hijrah. This evidence does not necessarily prove that the terminology was not in use before then.'⁸

Initially the use of the term '*Sunnah*' was not restricted to the *Sunnah* of the Prophet but was used to imply the practice of the community and precedent of the Companions. This usage of '*Sunnah*' seems to have continued until the late second century when al-Shāfi'i tried to restrict it to the *Sunnah* of the Prophet alone. Sometimes the Arabic definite article '*al*' was prefixed to *Sunnah* to denote the *Sunnah* of the Prophet while the general usage of *Sunnah* as a reference to the practice of the community, or its living tradition, continued. By the end of the second century Hijrah, the technical/juristic meaning of *Sunnah* appears to have become dominant, until the '*ulamā*' used it exclusively to imply the normative conduct of the Prophet.⁹ The '*ulamā*' thus discouraged the use of such expressions as the *Sunnah* of Abū Bakr or 'Umar. In their view, the proper usages of *Sunnah* were to be confined to *Sunnah Allāh*, and *Sunnah Rasūl Allāh*, that is the *Sunnah* of God, or His way of doing things, and the *Sunnah* of His Messenger. But there were variant opinions among the '*ulamā*' which disputed the foregoing, especially in view of the *ḥadīth* in which the Prophet is reported to have said, 'You are to follow my *Sunnah* and the *Sunnah* of the Rightly-Guided Caliphs.'

عليكم بسنتي وسنة الخلفاء الراشدين من بعدي .

But again, as al-Shawkāni points out, it is possible that in this *ḥadīth*, the Prophet had used '*Sunnah*' as a substitute for '*ṭarīqah*' or the way that his Companions had shown.¹⁰ Al-Shawkāni's interpretation

suggests that the Prophet may not have used '*Sunnah*' in the exclusive sense that the '*ulamā*' later attempted to attach to this term.

In its juristic usage, '*Sunnah*' has meant different things. To the '*ulamā*' of *uṣūl al-fiqh*, *Sunnah* refers to a source of the *Sharī'ah* and a legal proof next to the Qur'ān. But to the '*ulamā*' of *fiqh*, '*Sunnah*' primarily refers to a *shar'ī* value which falls under the general category of *mandūb*. Although in this sense *Sunnah* is used almost synonymously with *mandūb*, it does not necessarily mean that *Sunnah* is confined to the *mandūb*. For in its other usage, namely as a source of *Sharī'ah*, *Sunnah* may authorise and create not only a *mandūb* but also any of the following: *wājib*, *ḥarām*, *makrūh* and *mubāh*. Thus in the usage of *uṣūl al-fiqh*, one might say that this or that ruling has been validated by the Qur'ān or by the *Sunnah*, whereas a *faqīh* would be inclined to say that this or that act is *Sunnah*, which means that it is neither *fard* nor *wājib*; it is one of the five values which falls under the category of *mandūb*. To the '*ulamā*' of *ḥadīth*, on the other hand, *Sunnah* includes all that is narrated from the Prophet, his words, acts, and tacit approvals, whether before or after the beginning of his prophetic mission, and once again regardless of whether it may contain a ruling of the *Sharī'ah* or not.¹¹

Notwithstanding the fact that the '*ulamā*' have used *Sunnah* and *ḥadīth* almost interchangeably, the two terms have meanings of their own. Literally, *ḥadīth* means a narrative, communication or news consisting of the factual account of an event. The word occurs frequently in the Qur'ān (twenty-three times to be precise) and in all cases it carries the meaning of a narrative or communication. In none of these instances has *ḥadīth* been used in its technical, exclusive sense, that is, the sayings of the Prophet. In the early days of Islam, following the demise of the Prophet, stories relating to the life and activities of the Prophet dominated all other kinds of narratives, so the word began to be used almost exclusively for a narrative from, or a saying of, the Prophet.¹²

Ḥadīth differs from *Sunnah* in that *ḥadīth* is a narration of the conduct of the Prophet whereas *Sunnah* is the example or the law that is deduced from it. *Ḥadīth* in this sense is the vehicle or the carrier of *Sunnah*, although *Sunnah* is a wider concept and used to be so especially before its literal meaning gave way to its juristic usage. *Sunnah* thus referred not only to the *ḥadīth* of the Prophet but also to the established practice of the community. But once the literal meanings of *ḥadīth* and *Sunnah* gave way to their technical usages and were both exclusively used in reference to the conduct of the Prophet, the two

became synonymous. This was largely a result of al-Shāfi'i's efforts, who insisted that the *Sunnah* must always be derived from a genuine *ḥadīth* and that there was no *Sunnah* outside the *ḥadīth*. In the pre-Shāfi'i period, *ḥadīth* was also applied to the statements of the Companions and their Successors, the *ṭabī'ūn*. It thus appears that *ḥadīth* began to be used exclusively for the acts and sayings of the Prophet only after the distinction between the *Sunnah* and *ḥadīth* was set aside.¹³

There are two other terms, namely *khbar* and *athar*, which have often been used as alternatives to *ḥadīth*. Literally, *khbar* means 'news or report', and *athar*, 'impression, vestige or impact'. The word *khbar* in the phrase '*khbar al-waḥīd*', for example, means a solitary *ḥadīth*. The majority of 'ulamā' have used *ḥadīth*, *khbar* and *athar* synonymously, whereas others have distinguished *khbar* from *athar*. While the former is used synonymously with *ḥadīth*, *athar* (and sometimes 'amal) is used to imply the precedent of the Companions.¹⁴

The majority of 'ulamā' have upheld the precedent of the Companions as one of the transmitted (*naqlī*) proofs. The jurists of the early schools of law are known to have based opinions on *athar*. Imam Mālik even went so far as to set aside the Prophetic *ḥadīth* in favour of *athar* on the strength of the argument that *athar* represented the genuine *Sunnah*, as the Companions were in a better position to ascertain the authentic *Sunnah* of the Prophet. There were indeed, among the Companions, many distinguished figures whose legal acumen and intimate knowledge of the sources equipped them with a special authority to issue *fatwās*. Sometimes they met in groups to discuss the problems they encountered, and their agreement or collective judgement is also known as *athar*. For al-Shāfi'i (d. 204 AH), however, *athar* does not necessarily represent the *Sunnah* of the Prophet. In the absence of *ḥadīth* from the Prophet, al-Shāfi'i followed the precedent of Companions, and in cases where a difference of opinion existed among the Companions, al-Shāfi'i preferred the opinion of the first four caliphs over others, or one which was in greater harmony with the Qur'ān.¹⁵ According to al-Shāfi'i, the *Sunnah*, coming direct from the Prophet in the form of *ḥadīth* through a reliable chain of narrators, is a source of law irrespective of whether it was accepted by the community or not. He emphasised the authority of the *ḥadīth* from the Prophet in preference to the opinion or practice of the Companions. Al-Shāfi'i contended that *ḥadīth* from the Prophet, even a solitary *ḥadīth*, must take priority over the practice and opinion of the community, the Companions and the Successors.¹⁶ Al-Shāfi'i directed

his efforts mainly against the then prevailing practice among jurists of giving preference to the practice of the community and the decisions of the Companions over the *ḥadīth*. Al-Shāfi'i attempted to overrule the argument, advanced by Imam Mālik, for example, that Medinan practice was more authoritative than *ḥadīth*. In his *Muwaffā'*, for example, Mālik (d. 179 AH) generally opens every legal chapter with a *ḥadīth* from the Prophet, but in determining detailed legal issues, he does not consistently adhere to the principle of the priority of *ḥadīth* over *athar*. It is interesting to note that the *Muwaffā'* contains 1,720 *ḥadīth*, out of which 822 are from the Prophet and the remainder from the Companions, Successors and others. This would suggest that Imam Mālik was not overly concerned with the distinction between *ḥadīth* and *athar* that was to become the main theme of al-Shāfi'i's endeavour to establish the overriding authority of the Prophetic *ḥadīth*.¹⁷

I. Proof-Value (*Hujjiyyah*) of *Sunnah*

The 'ulamā' are unanimous on the point that *Sunnah* is a source of *Sharī'ah* and that in its rulings with regard to *halāl* and *ḥarām*, it stands on the same footing as the Qur'ān.¹⁸ The *Sunnah* of the Prophet is a proof (*hujjah*) for the Qur'ān, testifies to its authority and enjoins the Muslim to comply with it. The words of the Prophet, the Qur'ān tells us, are divinely inspired (al-Najm, 53:3). His acts and teachings that were meant to establish a rule of *Sharī'ah* constitute a binding proof.¹⁹ While commenting on the Qur'ānic *āyah* which states of the Prophet that 'he does not speak of his own desire, it is none other than *waḥy* sent to him', al-Ghazālī writes that some of the divine revelation that the Prophet received constitutes the Qur'ān, whereas the remainder is *Sunnah*. The words of the Prophet are a *hujjah* for anyone who heard the Prophet saying them. As for us and the generality of Muslims who have received them through the verbal and written reports of narrators, we need to ascertain their authenticity.²⁰ The proof of authenticity may be definitive (*qaṭ'i*), or it may amount to a preferable conjecture (*al-zann al-rājiḥ*); in either case, the *Sunnah* commands obedience of the *mukallaf*. All the rulings of the Prophet, especially those which correspond with the Qur'ān and corroborate its contents, constitute binding law.²¹

In more than one place, the Qur'ān enjoins obedience to the Prophet and makes it the duty of the believers to submit to his judgement and his authority without question. The following *āyāt* are

explicit on this theme, all of which are quoted by al-Shāfi'ī in his renowned work, *al-Risālah*:²²

And whatever the Messenger gives you, take it, and whatever he forbids you, abstain from it (al-Hashr, 59:77).

وما أتاكم الرسول فخذوه وما نهاكم عنه فانتهوا

Obey God and obey the Messenger and those who are in charge of affairs among you. Should you happen to dispute over something, then refer it to God and to the Messenger (al-Nisā', 4:58-59).

يأياها الذين آمنوا أطيعوا الله والرسول وأولي الأمر

منكم فإن تنازعتم في شيء فردوه إلى الله والرسول

To refer the judgement of a dispute to God means recourse to the Qur'an, and referring it to the Messenger means recourse to the *Sunnah*.²³ In another passage, the Qur'an emphasises: 'Whoever obeys the Messenger verily obeys God' (al-Nisā', 4:80).

من يطع الرسول فقد أطاع الله

And finally, the Qur'an is categorical about the fact that the definitive rulings of the Qur'an and *Sunnah* are binding on the believers in that they are no longer at liberty to differ with the dictates of the divine will or to follow a course of their own choice: 'Whenever God and His Messenger have decided a matter, it is not for a believing man or woman to follow another course of his or her own choice' (al-Aḥzāb, 33:36).

وما كان لمومن ولا مؤمنة إذا قضى الله ورسوله أمرا

أن يكون لهم الخيرة من أمرهم

In yet another place the Qur'an stresses that submission to the authority of the Prophet is not a matter of mere formalistic legality but is an integral part of the Muslim faith: 'By your Lord, they will not believe till they make you a judge regarding disagreements between them and find in themselves no resistance against accepting your verdict in full submission' (al-Nisā', 4:65).

فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم

ثم لا يجدوا في أنفسهم حرجا مما قضيت ويسلموا تسليما

It is concluded from these and other similar passages in the Qur'an that the *Sunnah* is a proof next to the Qur'an in all *shar'ī* matters, and that conformity to the terms of Prophetic legislation is a Qur'anic obligation on all Muslims. The Companions have reached a consensus on this point: both during the lifetime of the Prophet and following his demise, they eagerly obeyed the Prophet's instructions and followed his examples regardless of whether his commands or prohibitions originated in the Qur'an or otherwise. The first two caliphs, Abū Bakr and 'Umar, resorted to the *Sunnah* of the Prophet whenever they knew of it. In cases when they did not know, they would ascertain whether other Companions had any knowledge of the Prophetic *Sunnah* in connection with particular issues. The Caliph 'Umar is also on record as having issued written instructions to his judges in which he asked them to follow the *Sunnah* of the Prophet whenever they could not find the necessary guidance in the Qur'an.²⁴

II. Classification and Value: (A)

Sunnah has been classified in various ways, depending, of course, on the purpose of classification and the perspective of the investigator. However, two of the most commonly accepted criteria for such classifications are the subject-matter (*matn*) of *Sunnah* and the manner of its transmission (*isnād*). This section is primarily concerned with the classification of *Sunnah* from the viewpoint of its subject-matter.

To begin with, the *Sunnah* is divided into three types, namely verbal (*qawli*), actual (*fi'li*) and tacitly approved (*taqrīf*). The other division of the *Sunnah* which will concern us here is its division into legal and non-legal *Sunnah*.

The verbal *Sunnah* consist of the sayings of the Prophet on any subject, such as the *ḥadīth* 'fi al-sā'imah zakāh' (livestock is liable to zakāh).²⁵ The actual *Sunnah* of the Prophet consists of his deeds and instructions, such as the way he performed the *ṣalāh*, the fasting, the rituals of *ḥajj*, or the transactions he concluded, such as sale and giving loans, etc. Similarly, the fact that the Prophet authorised mutilation of the hand of the thief from the wrist illustrated, in actual terms, how

the Qur'ānic *āyah* (al-Mā'idah, 5:38) should be implemented. This *āyah* simply states that the hand should be cut without specifying which part. The tacitly approved *Sunnah* consists of the acts and sayings of the Companions which came to the knowledge of the Prophet and of which he approved. The tacit approval of the Prophet may be inferred from his silence and lack of disapproval, or from his express approval and verbal confirmation.²⁶ An example of such a *Sunnah* is the report that two of the Companions went on a journey, and when they failed to find water for ablution, they both performed the obligatory prayers with *tayammum*, that is, wiping the hands, face and feet with clean sand. Later, when they found water, one of them performed the prayers again whereas the other did not. Upon their return, they related their experience to the Prophet, who is reported to have approved both courses of action. Hence it became *Sunnah taqrīriyya*.²⁷ Another example of this is the report that one of the prominent Companions, 'Amr ibn al-'As, said that in the campaign of Dhāt al-Salāsīl he had had a wet dream in the night, but owing to extreme cold he did not take a bath but instead performed the morning *ṣalāh* with *tayammum*. He then related this to the Prophet, who laughed but said nothing, which would imply that the act in question is permissible in similar circumstances, that is, when extreme cold proves to be hazardous to health.²⁸

Another example is the instruction, recorded by al-Bukhārī, that the Prophet issued on the occasion of the Battle of Banī Qurayzah where he said that 'no one shall perform the [ṣalāh of] *ʿaṣr* except in Banī Qurayzah'.

لَا يُصَلِّيَنَّ أَحَدُكُمْ الْعَصْرَ إِلَّا فِي بَنِي قُرَيْظَةَ.

Some Companions took this literally and did not pray the *ʿaṣr* at the time of *ʿaṣr*, whereas others understood it to mean that they should hurry to reach their destination but also perform the *ʿaṣr* in time. Later, when the Prophet learned of it, he did not object to either course of action.

The sayings of Companions such as 'we used to do such and such during the lifetime of the Prophet' constitute a part of *Sunnah taqrīriyya* only if the subject is such that it could not have failed to attract the attention of the Prophet. An example of this is the saying of Abū Sa'īd al-Khudrī that 'for the charity of *ʿid al-Fiṭr*, we used to give a *ṣāʾ* of dates or of barley'. This is a matter that could not have remained hidden and therefore constitutes *Sunnah taqrīriyya*.²⁹

There is a view that these three varieties can be unified under the actual *Sunnah*, because words that are spoken are an act of the tongue, and tacit approval of something may also be seen as an act of the heart. But this view is not widely accepted, despite its basic truth, simply because general custom, and also the Qur'ān itself, differentiate between words and deeds. Note, for example, the text where we read, 'It is a heinous abomination in the sight of God that you say things which you do not do' (al-Ṣaff, 61:3).

كبر مقيا عند الله ان تقولوا ما لا تفعلون

Words and deeds are, therefore, two different things, and hence the classification above.³⁰

The entire bulk of the *Sunnah*, that is, the sayings, acts and tacit enactments of the Prophet, may once again be divided into two types: non-legal and legal *Sunnah*.

Non-legal *Sunnah* (*Sunnah ghayr tashrī'iyyah*) mainly consists of the natural activities of the Prophet (*al-af'āl al-jibillīyyah*) such as the manner in which he ate, slept, dressed, and such other activities as do not seek to constitute a part of the *Sharī'ah*. Activities of this nature are not of primary importance to the Prophetic mission and therefore do not constitute legal norms. According to the majority of 'ulamā', the Prophet's preferences in these areas, such as his favourite colours, or the fact that he slept on his right side in the first place, etc., only indicate the permissibility (*ibāhah*) of the acts in question.³¹ The reason given is that such acts could be either *wājib*, *mandūb* or merely *mubāh*. The first two can only be established by means of positive evidence: *wājib* and *mandūb* are normally held to be absent unless they are proved to exist. Since there is no such evidence to establish that the natural activities of the Prophet fall into either of these two categories, there remains the category of *mubāh* and they fall in this category for which no positive evidence is necessary.³²

On a similar note, *Sunnah* relating to specialised or technical knowledge, such as medicine, commerce and agriculture, is once again held to be peripheral to the main function of the Prophetic mission and is therefore not a part of the *Sharī'ah*. As for the acts and sayings of the Prophet that related to particular circumstances such as the strategy of war, including devices that misled the enemy forces, timing of attack, siege or withdrawal, these too are considered to be situational and not a part of the *Sharī'ah*.³³

There are certain matters which are peculiar to the person of the

Prophet so that his example concerning them does not constitute general law. For instance, polygamy above the limit of four, marriage without a dower, prohibition of remarriage for the widows of the Prophet, connected fasting (*ṣaum al-wiṣāl*) and the fact that the Prophet admitted the testimony of Khuzaymah ibn Thābit as legal proof. The rules of *Sharʿ*ah concerning these matters are as stated in the Qurʾān, and remain the legal norm for the generality of Muslims.³⁴ According to the majority opinion, the position in regard to such matters is partly determined by reference to the relevant text of the Qurʾān and the manner in which the Prophet is addressed. When, for example, the Qurʾān addresses the Prophet in such terms as 'O you Messenger' or 'O you folded up in garments' (al-Muzzammil, 73:1; al-Muddaththir, 74:1), it is implied that the address is to the Prophet alone unless there is conclusive evidence to suggest otherwise.³⁵

Certain activities of the Prophet may fall in between the two categories of legal and non-legal *Sunnah* as they combine the attributes of both. Thus it may be difficult to determine whether an act was strictly personal or was intended to set an example for others to follow. It is also known that at times the Prophet acted in a certain way which was in accord with the then prevailing custom of the community. For instance, the Prophet kept his beard at a certain length and trimmed his moustache. The majority of 'ulamā' have viewed this not as mere observance of the familiar usage at the time but as an example for the believers to follow. Others have held the opposite view by saying that this was a part of the social practice of the Arabs which was designed to prevent resemblance to the Jews and some non-Arabs who used to shave the beard and grow the moustache. Such practices were, in other words, a part of the current usage and basically optional. Similarly, it is known that the Prophet used to go to the 'id prayers (*ṣalāt al-ʿid*) by one route and return from the mosque by a different route, and that the Prophet at times performed the *hajj* pilgrimage while riding a camel. The Shāfiʿi jurists are inclined to prefer the commendable (*mandūb*) in such acts to mere permissibility whereas the Hanafis consider them as merely permissible, or *mubāh*. These approaches are taken basically in regard to *sharʿi* matters and things which the Prophet might have done in order to gain the pleasure of God. As for non-*sharʿi* matters such as trade and agriculture, Imam Mālik and the Hanafi jurist al-Kharkhī have held that in the absence of any indication, the Prophet's affirmative acts indicated permissibility whereas Imam Shāfiʿi and many Hanafis have held that they indicated *mandūb*.³⁶

The legal *Sunnah* (*Sunnah tashrīʿiyyah*) consists of the exemplary conduct of the Prophet, be it an act, saying, or a tacit approval, which incorporates the rules and principles of *Sharʿ*ah. This variety of *Sunnah* may be divided into three types, namely the *Sunnah* which the Prophet laid down in his capacities as Messenger of God, as the head of state or imam, or in his capacity as a judge. We shall discuss each of these separately, as follows.

(1) In his capacity as Messenger of God, the Prophet has laid down rules which are, on the whole, complementary to the Qurʾān, but also established rules on which the Qurʾān is silent. In this capacity, the *Sunnah* may consist of a clarification of the ambiguous (*mujmal*) parts of the Qurʾān or specifying and qualifying the general and the absolute contents of the Qurʾān. Whatever the Prophet has authorised pertaining to the principles of religion, especially in the area of devotional matters (*ibādāt*) and rules expounding the lawful and the unlawful, that is, the *halāl* and *harām*, constitutes general legislation (*tashrīʿ ʿamm*) whose validity is not restricted by the limitations of time and circumstance. All commands and prohibitions that are imposed by the *Sunnah* are binding on every Muslim regardless of individual circumstances, social status, or political office. In acting upon these laws, the individual normally does not need any prior authorisation by a religious leader or the government.³⁷

There is evidently a difference between these two types of *Sunnah*. What the Prophet has said or done by way of conveying the message, wrote al-Qarāfi, in the Thirty-Sixth Distinction of his *Kitāb al-Furūq*, 'becomes a general rule for everyone to whom it is addressed until the day of resurrection, and everyone must act directly, be it an obligation, a prohibition or even an *ibāḥah*. But everything that the Prophet has authorised in his capacity as the imam, it is not permissible for anyone to act upon it without obtaining a prior authorisation of the imam, because the Prophet himself acted in that capacity and it would be in keeping with his example to follow the same.'³⁸

In the spheres of government administration and politics, there are evidently matters such as the signing of treaties, division of the war booty, declaration of war, tactical decisions concerning military expeditions, and the appointment of officials in which the Prophet acted in his capacity not as the Messenger of God, but as the head of state.

The question arises as to how it is determined that the Prophet acted in one or the other of his three capacities as mentioned above. It is not always easy to answer this question in categorical terms. The uncertainty that has arisen in answering this question in particular

cases is, in fact, one of the main causes of juristic disagreement (*ikhtilāf*) among the *fuqahā*. The '*ulamā*' have on the whole attempted to ascertain the main thrust, or the direction (*jihah*) of the particular acts and sayings of the Prophet. An enquiry of this nature helps to provide an indication of the value of the *Sunnah* in question: whether it constitutes an obligation, commendation, or *ibāhah* on the one hand, or a prohibition or abomination (*karāhah*) on the other.

When the direction of an act is known from the evidence in the sources, there remains no doubt as to its value. If, for example, the Prophet attempts to explain an ambiguous ruling of the Qur'ān, the explanation so provided would fall into the same category of values as the original ruling itself. According to the majority of '*ulamā*', if the ambiguous of the Qur'ān is known to be obligatory or commendable, the explanatory *Sunnah* will carry the same value. For example, all the practical instructions of the Prophet which explained and illustrated the obligatory *ṣalāh* would be *wājib* and his acts pertaining to the supererogatory prayers, such as *ṣalāh* on the occasion of lunar and solar eclipse (*ṣalāt al-khusūf wa al-kusūf*), would be *mandūb*.³⁹ Alternatively, the *Sunnah* may itself provide a clear indication as to whether a particular rule it prescribes is *wājib*, *mandūb*, or merely permissible. Another method of ascertaining the value of a particular act is to draw an analogy between an undefined act and an act or saying whose value is known. Additionally, the subject-matter of the *Sunnah* may provide a sign or an indication as to its value. With regard to prayers, for example, the call to prayers, or *adhān*, and the call which immediately precedes the standing to congregational prayer (the *iqāmah*), are indications of the obligatory nature of the prayer. For it is known from the rules of *Sharī'ah* that *adhān* and *iqāmah* precede the obligatory *ṣalāh* only. A *ṣalāh* which is not obligatory such as the '*id* prayer, or *ṣalāt al-istiṣqā*' (prayers offered at the time of drought), are not preceded by the preliminaries of *adhān* or *iqāmah*. Another method of evaluating an act is by looking at its opposite, that is, its absence. If it is concluded that the act in question would have been in the nature of a prohibition had it not been authorised by the Prophet, then this would imply that it is obligatory. For example, circumcision is evaluated to be an obligation. Since it consists essentially of the infliction of injury for no obvious cause, had it not been made into an obligation, then it would presumably be unlawful. Its validation by the *Sharī'ah*, in other words, is taken as an indication of its *wujūb*. This explanation is basically applicable to all penalties the *Sharī'ah* has prescribed, although in most cases the value of the

prescribed punishment is understood from the direct rulings of the relevant texts. And lastly, an act may require the belated performance (*qadā*) of a *wājib* or a *mandūb*, and as such its value would correspond to that of its prompt performance (*adā*).⁴⁰

The foregoing are the categories of acts whose direction and value can be ascertained. However, if no such verification is possible, then one must look at the intention behind its enactment. If a Prophetic act is intended as a means of seeking the pleasure of God, then it is classified as *mandūb*; and according to a variant view, as *wājib*. However, if the intention behind a particular act cannot be detected either, then it is classified as *wājib*, and according to a variant view as *mandūb*; but the matter is subject to interpretation and *ijtihād*.⁴¹

(2) All the rulings of *Sunnah* which originate from the Prophet in his capacity as imam or head of state, such as the allocation and expenditure of public funds, decisions pertaining to military strategy and war, appointment of state officials, distribution of booty, signing of treaties, etc., partake of the legal *Sunnah* which, however, does not constitute general legislation (*tashrī' 'āmm*). *Sunnah* of this type may not be practised by individuals without obtaining the permission of competent government authorities first. The mere fact that the Prophet acted in a certain way, or said something relating to these matters, does not bind individuals directly, and does not entitle them to act on their own initiative without the express permission of the lawful authority.⁴² To give an example, according to a *ḥadīth*, 'Whoever kills a warrior [in battle] may take his belongings'.⁴³

من قتل قتيلًا فله سلبه.

The '*ulamā*' have differed on the precise import of this *ḥadīth*. Imam Mālik held that the Prophet uttered this *ḥadīth* in his capacity as imam, in which case no-one is entitled to the belongings of his victim in the battlefield without the express authorisation of the imam. The majority have held the view that this *ḥadīth* lays down a general law which entitles the soldier to the belongings of the deceased even without the permission of the imam.⁴⁴

On a similar note, when the prophet instructed Mu'ādh ibn Jabal, upon sending him to the Yemen, to 'take a dinar from every adult for poll tax',

خذ من كل حالم دينارًا.

the qualification here was evidently done in the capacity of imam, who considered this to be appropriate and fair. But this was not a religious edict, such as the tithe or one-twentieth that have been specified in relation to *zakāh*. This also explains why the Caliph 'Umar ibn al-Khaṭṭāb later imposed different amounts of *jizyah*, ranging between twelve and forty-eight dirhams, that is about one to four dinars. The Caliph had evidently understood that the Prophet-imam had not enacted a permanent rule of the *Sharī'ah* and that the exact quantity was to be determined in the light of prevailing conditions.

The Ḥanafīs have also held that the supplementary punishment of exile (or imprisonment for one year in *zinā*), which the Prophet imposed in some cases, was ordered by way of *siyāsah* and *ta'zīr*, that is, in his capacity as imam. Based on this interpretation, the Ḥanafīs have held the one year imprisonment to be a discretionary, as opposed to obligatory, punishment which the imam may or may not impose.

Al-Qaradāwī has discussed both these examples, and then added two other illustrations in which the Prophet acted in his capacity as imam. One of these was the division of the land of Khaybar among the conquerors. The Prophet considered this to be the best course of action to take at the time, but then he did not order the same on the conquest of Mecca. Instead the Prophet left the properties of the residents of Mecca untouched as this was seen to be one way of winning their hearts and support for Islam. Apparently the Jews of Khaybar could not be expected to do the same. The next example given is the *ḥadīth* in which the Prophet lifted the ban he had earlier imposed on the storage of sacrificial meat during the 'īd Festival of Aḍḥā. The ban was initially imposed because of the large crowds that were coming to the *ḥajj*, but then later he lifted the ban when it was no longer needed. In both events, the Prophet acted in his capacity as imam.⁴⁵

It has been observed that the Prophet might have uttered the *ḥadīth* which entitles the warrior to the belongings of his victim in order to encourage the Companions to do *jihād* in the light of the then prevailing circumstances. The circumstances may have been such that an incentive of this kind was required; or, perhaps, it was intended to lay down a general law without any regard for particular situations. According to Imam Shāfi'ī, the *ḥadīth* under consideration lays down a general rule of *Sharī'ah*. For this is the general norm in regard to the *Sunnah*. The main purpose of the Prophet's mission was to lay down the foundations of the *Sharī'ah* and, unless there is an indication to the contrary, one must assume that the purpose of the *ḥadīth* in general is to lay down general law.⁴⁶

(3) *Sunnah* which originates from the Prophet in his capacity as a judge in particular disputes usually consists of two parts: the part which relates to claims, evidence and factual proof, and the judgement which is issued as a result. The first part is situational and does not constitute general law, whereas the second part lays down general law, with the proviso, however, that it does not bind the individual directly, and no-one may act upon it without the prior authorisation of a competent judge. Since the Prophet himself acted in a judicial capacity, the rules that he has enacted must therefore be implemented by the office of the *qāḍī*.⁴⁷ Hence when a person has a claim over another which the latter denies, but the claimant knows of a similar dispute which the Prophet has adjudicated in a certain way, this would not entitle the claimant to take the law into his own hands. He must follow proper procedures to prove his claim and to obtain a judicial decision.⁴⁸

To distinguish the legal from non-legal *Sunnah*, it is necessary for the *mujtahid* to ascertain the original purpose and context in which a particular ruling of the *Sunnah* has been issued and whether it was designed to establish a general rule of law. The *ḥadīth* literature does not always provide clear information on the different capacities in which the Prophet might have acted in particular situations, although the *mujtahid* may find indications that assist him to some extent. The absence of adequate information and criteria on which to determine the circumstantial and non-legal *Sunnah* from that which constitutes general law dates back to the time of the Companions. The difficulty has persisted ever since, and it is mainly due to the shortage of adequate information that disagreement has arisen among the 'ulamā' over the understanding and interpretation of the *Sunnah*.⁴⁹

To give another example, juristic disagreement has arisen concerning a *ḥadīth* on the reclamation of barren land which reads, 'Whoever reclaims barren land becomes its owner'.⁵⁰

من أحى أرضاً ميتة فهي له.

The 'ulamā' have differed as to whether the Prophet uttered this *ḥadīth* in his capacity as prophet or in his capacity as head of state. If the former is established to be the case then the *ḥadīth* lays down a binding rule of law. Anyone who reclaims barren land becomes its owner and need not obtain any permission from the imam or anyone else, for the *ḥadīth* provides the necessary authority and there would be no need for official permission. If, on the other hand, it is established that the Prophet uttered this *ḥadīth* in his capacity as imam,

then it would imply that anyone who wishes to reclaim barren land must obtain the prior permission of the imam or anyone else. The *ḥadīth*, in other words, only entitles the imam to grant the citizen the right to reclaim barren land. The majority of jurists have adopted the first view whereas the Ḥanafīs have held the second. The majority of jurists, including Imams al-Shāfi'ī, Mālik and Abū Yūsuf, have held that the consent of the state is not necessary for anyone to commence reclaiming barren land, especially when no one is harmed by it. But it appears that jurists and scholars of the later ages prefer the Ḥanafī view which stipulates that reclaiming barren land requires the consent of the state. The Ḥanafī view is based on the rationale of preventing disputes among people. The Mālikīs on the other hand only require government consent when the land is close to a human settlement, and the Ḥanbalīs only when it has previously been alienated by another person.³¹

Disagreement has also arisen with regard to the *ḥadīth* that adjudicated the case of Hind, the wife of Abū Sufyān. Hind complained to the Prophet that her husband was a tight-fisted man and that, despite his affluence, he refused to give adequate maintenance to her and her child. The Prophet instructed her to 'take [of her husband's property] what is sufficient for yourself and your child according to custom'.³²

خذي ما يكفيك وولئك بالمعروف.

The 'ulamā' have disagreed as to whether the Prophet uttered this *ḥadīth* so as to enact a general rule of law, or whether he was acting in the capacity of a judge. Were it admitted that the *ḥadīth* consists of a judgement addressing a particular case, then it would only authorise the judge to issue a corresponding order. Thus it would be unlawful for a creditor to take his entitlement from the property of his debtor without a judicial order. If it were established, on the other hand, that the *ḥadīth* lays down a general rule of law, then no adjudication would be required to entitle the wife or the creditor to the property of the defaulting debtor, as the *ḥadīth* itself would provide the necessary authority. If any official permission is required, then it would have to be in the nature of a declaration or clearance only.³³

The Ḥanafīs, Shāfi'īs and Ḥanbalīs have held that when a man who is able to support his wife wilfully refuses to do so, it is for the wife to take action and for the *qāḍī* to grant a judgement in her favour. If the husband still refuses to fulfil his duty, the *qāḍī* may order the sale of his property from whose proceeds the wife may obtain her

maintenance. The court may even imprison a persistently neglectful husband. The wife is, however, not entitled to a divorce, the reason being that when the Prophet instructed Hind to take her maintenance from her husband's property, she was not granted the right to ask for a divorce. The Mālikīs are basically in agreement with the majority view, with the only difference that in the event of the husband's persistent refusal, the Mālikīs entitle the wife to ask for a divorce. Notwithstanding some disagreement as to whether the court should determine the quantity of maintenance on the basis of the financial status of the husband, the wife, or both, according to the majority view, the husband's standard of living should be the basis of the court decision. Thus the 'ulamā' have generally considered the *ḥadīth* under consideration to consist of a judicial decision of the Prophet, and as such it only authorises the judge to adjudicate the wife's complaint and to specify the quantity of maintenance and the method of its payment.³⁴

We also note that some of the Prophetic *ḥadīth* took into consideration the prevailing custom of Arab society at the time, and a correct understanding of such *ḥadīth* rulings would require that they are read in that context. Some of the *ḥadīth* on the subject of usury (*ribā*), for example, refer to commodities, especially wheat, barley and dates as measurable commodities that were sold by measurement, not weight. Later, when there was a change in the custom of society, the same items were consequently sold by weight and this was duly acknowledged by some 'ulamā', including Abū Yūsuf, who was of the view that the distinction between whether an item was measurable (*kaylī*) or sold by weight (*waznī*) was to be made by reference to the prevailing custom. But in saying so, Abū Yūsuf departed from the views of Imam Abū Ḥanīfah, who had earlier held that the prophetic characterisation of these items within the one category or the other was permanent and unchangeable. If the Prophet had identified wheat or dates as *kaylī*, they must remain as such for all time, regardless of customary change. But the correct view, as al-Qaradāwī has observed, is that of Abū Yūsuf.

A more explicit example of *Sunnah* that is predicated on 'uḥf is the determination of the quorum of *zakāh* in gold and silver, which were fixed at twenty dinars (about 85g) and two hundred dirhams (59.5g) respectively. One dinar in those days was equivalent to ten dirhams. The point to note here is that the Prophet had not meant to enact two different quorums for *zakāh*, but to establish valid and objective standards by which poverty and wealth can be distinguished for the

purpose of *zakah*. If we were to isolate the rulings of *Sunnah* from its underlying context and *urf*, and take a literal approach to enforcing them, this may amount to distortion. This is due to the considerable change that has taken place in the basic value of gold in relation to silver. Surely, in judging a person's liability to *zakah* we must refer to current economic conditions. Can we, in other words, say that a person who now owns eighty five grams of gold, or its equivalent in silver, is wealthy? The question has been raised by Abū Zahrah and 'Abd al-Wahhāb Khallāf, as also recounted al-Qaradāwī, and they all take the view that a uniform quorum should now be determined in gold (but not in both gold and silver) that would realistically determine a person's liability to *zakah* by reference to the prevailing economic conditions. Similar suggestions have been made in regard to the quantities of *diyyah* (blood money) and other relevant issues.³⁵

And lastly we note that some *ḥadīth* are worded in the form of general (*ʿamm*) rulings but they actually convey a specific (*khaṣṣ*) ruling. A correct understanding of such *ḥadīth* would require that they are not to be generalised but read in proper context. An example of this is the *ḥadīth* concerning the recommended toilet behaviour, particularly in respect of the direction in which one sits or urinates. The instruction here reads: 'Face not the *qiblah* when you pass a motion or urinate, nor should you turn your back to the *qiblah*. Face either the east or the west.'

لا تستقبلوا القبلة بغائط ولا بول ولا تستديروها ،
ولكن شرقوا أو غربوا .

Al-Bukhārī has quoted this and Ibn Hajar, the commentator of al-Bukhārī, has rightly stated that some people have taken this *ḥadīth* literally, which is obviously erroneous. The *ḥadīth*, although generally worded, is only addressed to the people of Medina, but people in such places like Egypt and Libya or Morocco would have actually acted contrary to the purpose of the *ḥadīth*, if they face eastwards. For a similar example, we also note the *ḥadīth*, again recorded in both al-Bukhārī and Muslim, on the authority of Nāfi' ibn 'Umar, where the Prophet said that 'fever – or high fever – is a portion of Hell, so cool it down with water'.

إنما الحمى أو شدة الحمى من فيح جهنم فأبردوها بالماء .

This *ḥadīth* has puzzled specialists in medicine and some have considered it contrary to the treatment they would advise for high fever. Once again the *ḥadīth* here, although conveyed in general terms, must be read in the context of the particular climate and other related factors.³⁶

Sunnah which consists of general legislation often has the quality of permanence and universal application to all Muslims. *Sunnah* of this type usually consists of commands and prohibitions which are related to the Qur'ān in the sense of endorsing, elaborating or qualifying the general provisions of the Holy Book.³⁷

II.1 Qur'ān and Sunnah Distinguished

The Qur'ān was recorded in writing from beginning to end during the lifetime of the Prophet, who ascertained that the Qur'ān was preserved as he received it through divine revelation. The Prophet clearly expressed the concern that nothing of his own *Sunnah* should be confused with the text of the Qur'ān. This was, in fact, the main reason why he discouraged his Companions, at the early stage of his mission in any case,³⁸ from reducing the *Sunnah* into writing lest it be confused with the Qur'ān. The *Sunnah*, on the other hand, was mainly retained in memory by the Companions who did not, on the whole, keep a written record of the teachings of the Prophet. There were perhaps some exceptions as the relevant literature suggests that some, though a small number, of the Companions held collections of the *ḥadīth* of the Prophet which they wrote and kept in their private collections. The overall impression, however, is that this was done on a fairly limited scale.

It is reported that 'Abd Allāh ibn 'Amr ibn al-ʿĀṣ said that, 'I used to write everything I heard from the Messenger of Allāh for my collection, but then the Quraysh advised me not to do so and said, "You write while the Messenger of God may be saying something in a state of anger!" Then I stopped until I mentioned this to the messenger of God and he said: "Write. By the One in whose hands my life reposes, I say only the truth" and he pointed his finger to me while saying so.' 'Abd Allāh ibn 'Amr ibn al-ʿĀṣ used to call his collection '*al-ṣaḥīfah al-sādiqah*'. Other Companions who wrote *ḥadīth* includes 'Abd Allāh ibn Mas'ūd and Sa'd ibn 'Ubadah. There is also a report that the Companion Abū Shāh asked the Prophet for permission to write and the Prophet granted his request.³⁹ It thus appears that the Prophet initially ordered the Companions not to write anything

other than the Qur'ān, but then, at a time perhaps when most of the Qur'ān had been received and documented, the Prophet permitted his teachings to be put into writing.

The Companions were generally assiduous in seeking and disseminating the teachings of the Prophet. Al-Bukhārī recorded the report in which 'Umar ibn al-Khaṭṭāb stated: 'I had a neighbour from the Anṣār in Medina and we used to take turns in attending to the Messenger of God. He would attend one day and I would the next. I would tell him of the events of the day I attended and he would do the same.'⁶⁰

The Companions used to verify instances of doubt concerning the text of the Qur'ān with the Prophet himself, who would often clarify them through clear instruction. This manner of verification is, however, unknown with regard to the *Sunnah*.⁶¹

The entire text of the Qur'ān has come down to us through continuous testimony (*taawātūr*) whereas the *Sunnah* has for the most part been narrated and transmitted in the form of solitary, or *āḥād*, reports. Only a small portion of the *Sunnah* has been transmitted in the form of *mutawāṭir*.

The Qur'ān in none of its parts consists of conceptual transmission, that is, transmission in the words of the narrator himself. Both the concepts and words of the Qur'ān have been recorded and transmitted as the Prophet received them. The *Sunnah* on the other hand consists, in the most part, of the transmission of concepts in words and sentences that belong to the narrators. This is why one often finds that different versions of the one and the same *ḥadīth* are reported by people whose understanding or interpretation of a particular *ḥadīth* is not identical. The scope of *ikhtilāf*, or disagreement, over the *Sunnah* is more extensive than that which may exist regarding the Qur'ān. Whereas the 'ulamā' have differed in their understanding/interpretation of the text of the Qur'ān, there is no such problem concerning the authenticity of the contents of the Qur'ān. But disagreement over the *Sunnah* extends not only to questions of interpretation but also to authenticity and proof, issues on which we shall further elaborate as our discussion proceeds.⁶²

II.2 The Priority of the Qur'ān over the *Sunnah*

As *Sunnah* is the second source of the *Shari'ah* after the Qur'ān, the *mujtahid* is bound to observe the order of priority between the Qur'ān and *Sunnah*. Hence in his search for a solution to a particular problem,

the jurist must resort to the *Sunnah* only when he fails to find any guidance in the Qur'ān. Should there be a clear text in the Qur'ān, it must be followed and be given priority over any ruling of the *Sunnah* which may happen to be in conflict with the Qur'ān. The priority of the Qur'ān over the *Sunnah* is partly a result of the fact that the Qur'ān consists wholly of manifest revelation (*wahy ṣāḥir*) whereas the *Sunnah* mainly consists of internal revelation (*wahy ḥāṭin*) and is largely transmitted in the words of the narrators themselves. The other reason for this order of priority relates to the question of authenticity. The authenticity of the Qur'ān is not open to doubt. It is, in other words, *qaf'i*, or decisive, in respect of authenticity and must therefore take priority over the *Sunnah*, or at least that part of *Sunnah* which is speculative (*ẓannī*) in respect of authenticity. The third point in favour of establishing an order of priority between the Qur'ān and the *Sunnah* is that the latter is explanatory of the former. Explanation or commentary should naturally occupy a secondary place in relationship to the source.⁶³ Furthermore, the order of priority between the Qur'ān and *Sunnah* is clearly established in the *ḥadīth* of Mu'adh ibn Jabal quoted earlier. The purport of this *ḥadīth* was also adopted and communicated in writing by 'Umar ibn al-Khaṭṭāb to two judges, Shurayh ibn Ḥārith and Abū Mūsā al-Ash'ari, who were ordered to resort to the Qur'ān first and to the *Sunnah* only when they could find no guidance in the Qur'ān.⁶⁴

A practical consequence of this order of priority may be seen in the Ḥanafī distinction between *farḍ* and *wājib*. The former is founded on the definitive authority of the Qur'ān, whereas the latter is founded on the definitive *Sunnah*, but is one degree weaker because of a possible doubt in its transmission and accuracy of content. These are some of the factors that explain the general agreement of the 'ulamā' to the effect that the authority of the Qur'ān overrides that of the *Sunnah*.⁶⁵

There should in principle be no conflict between the Qur'ān and the authentic *Sunnah*. If, however, a conflict is seen to exist between them, they must be reconciled as far as possible and both should be retained. If this is not possible, the *Sunnah* in question is likely to be of doubtful authenticity and must therefore give way to the Qur'ān. No genuine conflict is known to exist between the *mutawāṭir ḥadīth* and the Qur'ān. All instances of conflict between the *Sunnah* and the Qur'ān, in fact, originate in the solitary, or *āḥād*, *ḥadīth*, which are in any case of doubtful authenticity and subordinate to the overriding authority of the Qur'ān.⁶⁶

It has, however, been suggested that establishing such an order of priority is anomalous and contrary to the basic role that the *Sunnah* plays in relation to the Qur'an. As the familiar Arabic phrase, attributed to Imam Abū 'Amr al-Awzā'i, '*al-Sunnah qāḍiyah 'ala al-keitāb*' (*Sunnah* is the arbiter of the Qur'an) suggests, it is normally the *Sunnah* which explains the Qur'an, not vice versa. The fact that the *Sunnah* explains and determines the precise meaning of the Qur'an means that the Qur'an is more dependent on the *Sunnah* than the *Sunnah* is on the Qur'an.⁶⁷ In the case, for example, where the text of the Qur'an imparts more than one meaning, or when it is conveyed in general terms, it is the *Sunnah* that specifies the meaning that must prevail. Again, the manifest (*ẓāhir*) of the Qur'an may be abandoned by the authority of the *Sunnah*, just as the *Sunnah* may qualify the absolute (*muṭlaq*) in the Qur'an. The Qur'an on the other hand does not play the same role with regard to the *Sunnah*. It is not the declared purpose of the Qur'an to explain or clarify the *Sunnah*, as this was done by the Prophet himself. Since the *Sunnah* explains, qualifies, and determines the purport of the Qur'an, it must take priority over the Qur'an. If this is admitted, it would follow that incidents of conflict between the Qur'an and *Sunnah* must be resolved in favour of the latter. Some '*ulamā*' have even advanced the view that the *ḥadīth* of Mu'adh ibn Jabal (which clearly confirms the Qur'an's priority over the *Sunnah*) is anomalous in that not everything in the Qur'an is given priority over the *Sunnah*.⁶⁸ For one thing, the *mutawātir ḥadīth* stands on the same footing as the Qur'an itself. Likewise, the manifest (*ẓāhir*) of the Qur'an is open to interpretation and *ijtihād* in the same way as the solitary, or *āḥād*, *ḥadīth*; which means that they are more or less equal in these respects. Furthermore, according to the majority opinion, before implementing a Qur'anic rule one must resort to the *Sunnah* and ascertain that the ruling in question has not been qualified in any way or given an interpretation on which the text of the Qur'an is not self-evident.⁶⁹

In response to the assertion that the *Sunnah* is the arbiter of the Qur'an, it will be noted, as al-Shāṭibī points out, that this need not interfere with the order of priority in favour of the Qur'an. In all cases where the *Sunnah* specifies or qualifies the general or the absolute terms of the Qur'an, the *Sunnah* in effect explains and interprets the Qur'an. In none of these instances is the Qur'an abandoned in favour of the *Sunnah*. The word *qāḍiyah* (arbiter) in the expression quoted above therefore means *mubayyinah* (explanatory) and does not imply the priority of the *Sunnah* over the Qur'an. This is, in fact, the

response that the phrase prompted from Imam Ahmad ibn Hanbal, who is on record to have stated somewhat angrily, 'How impudent to say that the *Sunnah* explains and clarifies the Book.' The textual rulings of the Qur'an concerning theft and the obligation of *zakāh* have, for example, been qualified by the *Sunnah*. However, it is only proper to say that in both these cases, the *Sunnah* elaborates the general rulings of the Qur'an, and it would hardly be accurate to suggest that the *Sunnah* has introduced anything new, or that it seeks to overrule the Qur'an. When an interpreter explains a particular legal text to us, it would hardly be correct to say that we act upon the words of the interpreter without referring to the legal text itself.⁷⁰

Furthermore, the explanatory role of the *Sunnah* in relation to the Qur'an has been determined by the Qur'an itself, where we read in an address to the Prophet in sūra al-Nahl (16:44): 'We have sent down to you the Remembrance so that you may explain to the people what has been revealed to them.'

وَأَنزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نَزَلَ إِلَيْهِمْ

The correct conclusion drawn from this and similar Qur'anic passages is that the *Sunnah*, being explanatory to the Qur'an, is subordinate to it.⁷¹

II.3 Is *Sunnah* an Independent Source?

An adequate answer to the question as to whether the *Sunnah* is a mere supplement to the Qur'an or a source in its own right necessitates an elaboration of the relationship of the *Sunnah* to the Qur'an in the following three capacities.

Firstly, the *Sunnah* may consist of rules that merely confirm and reiterate the Qur'an, in which case the rules concerned originate in the Qur'an and are merely corroborated by the *Sunnah*. The question as to whether the *Sunnah* is an independent source is basically redundant with regard to matters on which the *Sunnah* merely confirms the Qur'an, as it is obvious that in such cases the *Sunnah* is not an independent source. A substantial part of the *Sunnah* is, in fact, of this variety: all *ḥadīth* pertaining to the five pillars of the faith and other such matters like the rights of one's parents, respect for the property of others, and *ḥadīth* which regulate homicide, theft and false testimony, etc., basically reaffirm the Qur'anic principles on these subjects.⁷² To

be more specific, the *ḥadīth* that 'it is unlawful to take the property of a Muslim without his express consent'⁷³

لا يَحِلُّ مَالُ امْرِءٍ مُسْلِمٍ إِلَّا بِطَيْبِ نَفْسِهِ.

merely confirms the Qur'anic *āyah* which orders the Muslims to 'devour not each others' properties unlawfully unless [or 'even if', according to a variant reading] it is through trade by your consent' (al-Nisā', 4:29).

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ

The origin of this rule is Qur'anic, and since the foregoing *ḥadīth* merely reaffirms the Qur'an, there is no room for saying that it constitutes an independent authority in its own right.

Secondly, the *Sunnah* may consist of an explanation or clarification of the Qur'an; it may clarify the ambivalent (*mujmal*) of the Qur'an, qualify its absolute statements, or specify the general terms of the Qur'an. This is, once again, the proper role that the *Sunnah* plays in relation to the Qur'an: it explains it. Once again, a substantial part of the *Sunnah* falls into this category. It is, for example, through this type of *Sunnah* that Qur'anic expressions such as *ṣalāh*, *ṣalāt*, *ḥajj* and *ribā*, etc., have acquired their juridical (*shar'i*) meanings. To give another example, with regard to the contract of sale, the Qur'an merely declares sale to be lawful, as opposed to *ribā*, which is forbidden. This general principle has later been elaborated by the *Sunnah*, which expounded the detailed rules of *Shar'ah* concerning sale, including its conditions and varieties, and sales which might amount to *ribā*. The same could be said of the lawful and unlawful varieties of food, a subject on which the Qur'an contains only general guidelines while the *Sunnah* specifies them and provides the details.⁷⁴ The *Sunnah* in this way specifies the general (*'amm*) of the Qur'an. Note, for example, that the Qur'anic command on fasting 'so every one of you who is present during that month should fast' (al-Baqarah, 2:185)

فَمَنْ شَهِدَ مِنْكُمُ الشَّهْرَ فَلْيَصُمْهُ

has been specified by the *ḥadīth* which exonerated three categories of people from this (and other laws of *Shar'ah*). These are the minors,

the insane and the persons asleep until they wake up. Similarly, the Qur'an declared sale permissible but usury unlawful (al-Baqarah, 2:275) but then the *Sunnah* specified this in respect of the sale of wet dates for dry dates (i.e. *'arāyah*). We note further that the general rules of inheritance in the Qur'an have been specified by the ruling of *ḥadīth*, which barred the killer from inheritance. The Qur'anic ruling on the prohibition of carcasses for human consumption has also been specified by the *ḥadīth* which makes an exception in respect of fish and locusts. The *Sunnah* also qualifies the absolute (*muṣṭaq*) of the Qur'an. An example of this is the Qur'anic punishment for theft which is conveyed in absolute terms, but then the *Sunnah* qualifies it and rules that the hand should be mutilated from the wrist. On the same subject, the *Sunnah* has laid down a further qualification that 'there shall be no mutilation for less than a quarter of a dinar'. Again, on the subject of bequest, the Qur'an provides for the basic legality of bequest and the rule that it must be implemented prior to the distribution of the estate among the heirs (al-Nisā', 4:12). The *Sunnah* supplements these principles by providing additional rules which facilitate a proper implementation of the general principles of the Qur'an.⁷⁵

The foregoing two varieties of *Sunnah* between them comprise the largest bulk of *Sunnah*, and the '*ulamā*' are in agreement that these two types of *Sunnah* are integral to the Qur'an and constitute a logical whole with it. The two cannot be separated or taken independently from one another. It is considered that the *Sunnah* that qualifies or elaborates the general provisions of the Qur'an on devotional matters (*'ibādāt*), on the punishment for theft, on the duty of *ṣalāt* and on the subject of bequests, could only have originated in divine inspiration (*ilhām*), for these cannot be determined by means of rationality and *ijtihad* alone.⁷⁶

Thirdly, the *Sunnah* may consist of rulings on which the Qur'an is silent, in which case the ruling in question originates in the *Sunnah* itself. This variety of *Sunnah*, referred to as *al-Sunnah al-mu'assisah*, or 'founding *Sunnah*', neither confirms nor opposes the Qur'an, and its contents cannot be traced back to the Holy Book. It is only this variety of *Sunnah* that lies at the centre of the debate as to whether or not the *Sunnah* is an independent source of law. To give some examples: the prohibition regarding simultaneous marriage to the maternal and paternal aunt of one's wife (often referred to as 'unlawful conjunction'), adjudication on the basis of one witness plus an oath by the claimant, the charity known as *ṣadaqah al-fitr*, the payment of blood-money (*diyyah*) by the kinsmen (*'āqilah*), prohibition of the

flesh for human consumption of certain animals and birds, the right of pre-emption (*shuf*), the grandmother's entitlement to a share in inheritance, the punishment of *rajm*, that is, death by stoning for adultery when committed by a married Muslim – all originate in the *Sunnah* as the Qur'an itself is silent on these matters.⁷⁷

There is some disagreement among jurists as to whether the *Sunnah*, or this last variety of it at any rate, constitutes an independent source of *Sharī'ah*. Some 'ulamā' of the later ages (*al-muta' akhkhirūn*), including al-Shātibī and al-Shawkānī, have held the view that the *Sunnah* is an independent source. Al-Shawkānī has stated that the rulings of *Sunnah* on the subject of the lawful and unlawful are equivalent to those of the Qur'an. He then quotes the *ḥadīth* of the Prophet 'I have indeed been given the Qur'an and the like of it with it.' The Prophet, in other words, regarded the *Sunnah* as the like (*mithl*) of the Qur'an.⁷⁸

ألا وإني آتيت القرآن ومثله معه.

It is also suggested that the Qur'anic *āyah* in sūra al-Nahl (16:44), quoted above, is inconclusive and that, despite its being clear on the point that the Prophet interprets the Qur'an, it does not overrule the recognition of the *Sunnah* as an independent source. On the contrary, it is argued that there is evidence in the Qur'an that substantiates the independent status of *Sunnah*. The Qur'an, for example, in more than one place requires the believers to 'obey God and obey His Messenger' (al-Nisā', 4:59; al-Mā'idah, 5:92).

يا أيها الذين آمنوا أطيعوا الله وأطيعوا الرسول

The fact that obedience to the Prophet is specifically enjoined next to obeying God warrants the conclusion that obedience to the Prophet means obeying him whenever he orders or prohibits something on which the Qur'an might be silent. If the purpose of obedience to the Prophet were to obey him only when he explained the Qur'an, then 'obey God' would be sufficient and there would have been no need to add the phrase 'obey the Messenger'.⁷⁹ Elsewhere the Qur'an clearly places submission and obedience to the Prophet at the very heart of the faith as a test of one's acceptance of Islam. This is the purport of the *āyah* which reads: 'By your Lord, they will not believe till they make you the judge regarding disagreements between them, and find in themselves no resistance against the verdict, but accept it in full submission' (al-Nisā', 4:65).

فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم

ثم لا يجلدوا في أنفسهم حرجا مما قضيت ويسلموا تسليما

Furthermore, the proponents of the independent status of the *Sunnah* have quoted the *ḥadīth* of Mu'adh ibn Jabal in support of their argument. The *ḥadīth* is clear on the point that the *Sunnah* is authoritative in cases on which no guidance can be found in the Qur'an. The *Sunnah*, in other words, stands on its own feet regardless of whether it is substantiated by the Qur'an or not.⁸⁰

According to the majority of 'ulamā', however, the *Sunnah*, in all its parts, even when it enacts original legislation, is explanatory and integral to the Qur'an.⁸¹ Al-Shāfi'i's views on this matter are representative of the majority position. In his *Risālah*, al-Shāfi'i states:

I do not know anyone among the 'ulamā' to oppose [the doctrine] that the *Sunnah* of the Prophet is of three types: first is the *Sunnah* which prescribes the like of what God has revealed in His Book; next is the *Sunnah* which explains the general principles of the Qur'an and clarifies the will of God; and last is the *Sunnah* where the Messenger of God has ruled on matters on which nothing can be found in the Book of God. The first two varieties are integral to the Qur'an, but the 'ulamā' have differed as to the third.⁸²

Al-Shāfi'i goes on to explain the views that the 'ulamā' have advanced concerning the relationship of *Sunnah* to the Qur'an. One of these views, which receives strong support from al-Shāfi'i himself, is that God has explicitly rendered obedience to the Prophet an obligatory duty (*fard*). In his capacity as Messenger of God, the Prophet has introduced laws, some of which originate in the Qur'an while others do not. But all Prophetic legislation emanates from divine authority. The *Sunnah* and the Qur'an are of the same provenance, and all must be upheld and obeyed. Others have held the view that the Prophetic mission itself, that is the fact that the Prophet is the chosen Messenger of God, is sufficient proof for the authority of the *Sunnah*, for it is through the *Sunnah* that the Prophet fulfilled his divine mission. According to yet another view, there is no *Sunnah* whose origin cannot be traced back to the Qur'an. This view maintains that even the *Sunnah* that explains the number and content of *ṣalāh* and the quantities of *zakāh*, as well as the lawful and forbidden varieties of food and trade, merely elaborates general principles of the Qur'an.⁸³ More specifically, all the *ḥadīth* which provide details on the lawful

and unlawful varieties of food merely elaborate the Qur'anic declaration that God has permitted wholesome food and prohibited that which is unclean (al-A'raf, 7:157).⁸⁴

The majority view, which seeks to establish an almost total identity between the *Sunnah* and the Qur'an, further refers to the saying of the Prophet's widow, 'Ā'ishah, when she attempted to interpret the Qur'anic epithet 'and you possess an excellent character' (al-Qalam, 68:4).

وإنك لعلى خلق عظيم

'Ā'ishah is quoted to have said that 'his [the Prophet's] *khuluq* was the Qur'an'. *Khuluq* in this context means the conduct of the Prophet, his acts, sayings, and all that he has approved. Thus it is concluded that the *Sunnah* is not separate from the Qur'an.⁸⁵

Furthermore, the majority view seeks to establish an identity between the general objectives of the Qur'an and *Sunnah*: the *Sunnah* and the Qur'an are unanimous in their pursuit of the three-fold objectives of protecting the necessities (*darū'iyāt*), complementary requirements (*hājīyyāt*) and the 'embellishments' (*tahsīniyyāt*).⁸⁶ It is then argued that even when the *Sunnah* broaches new ground, it is with the purpose of giving effect to one or other of the objectives that have been validated in the Qur'an. Thus the identity between the Qur'an and *Sunnah* is transferred, from one of theme and subject, to that of the main purpose and spirit that is common to both.⁸⁷

And finally, the majority explain that some of the rulings of the *Sunnah* consist of analogies with the Qur'an. For example, the Qur'an has decreed that no one may marry two sisters simultaneously. The *ḥadīth* which prohibits simultaneous marriage to the maternal and paternal aunt of one's wife is based on the same effective cause ('illah), which is to avoid the severance of close ties of kinship (*qaf' al-arḥām*). In short, the *Sunnah* as a whole is no more than a supplement to the Qur'an. The Qur'an is indeed more than comprehensive and provides complete guidance on the broad outline of the entire body of the *Sharī'ah*.⁸⁸

In conclusion, it may be said that both sides are essentially in agreement on the authority of *Sunnah* as a source of law and its principal role in relation to the Qur'an. They both acknowledge that the *Sunnah* contains legislation which is not found in the Qur'an.⁸⁹ The difference between them seems to be one of interpretation rather than substance. The Qur'anic *āyāt* on the duty of obedience to the

Prophet, and those which assign to him the role of the interpreter of the Qur'an, are open to variant interpretations. These passages have been quoted in support of both views, that the *Sunnah* is supplementary to the Qur'an, and that it is an independent source. The point that is basic to both these views is the authority of the Prophet and the duty of adherence to his *Sunnah*. In the meantime, both sides acknowledge the fact that the *Sunnah* contains legislation which is additional to the Qur'an. When this is recognised, the rest of the debate becomes largely redundant. For what else is there to be achieved from the argument that the *Sunnah* is an independent source? The partisans of the two views have, in effect, resolved their differences without perhaps declaring this to be the case. Since the Qur'an provides ample evidence that the Prophet explains the Qur'an and that he must be obeyed, there is no need to advance a theoretical conflict between the two facets of a basic unity. Both views can be admitted without the risk of running into a logical contradiction; the two views should therefore be seen not as contradictory but as logical extensions of one another.

II.4 Distortion and Forgery

There is no dispute about the occurrence of extensive forgery in the *ḥadīth* literature. The 'ulamā' of *ḥadīth* are unanimous on this, and some have gone so far as to affirm that in no other branch of Islamic sciences has there been so much forgery as in *ḥadīth*. The very existence of a bulk of literature and works by prominent 'ulamā' bearing the title *al-Mawḍū'āt*, or 'fabricated *ḥadīth*', bears witness to the extensive forgery in this area.⁹⁰

Some disagreement, however, has arisen in determining the historical origins of forgery in *ḥadīth*. While some observers have given the caliphate of 'Uthmān as a starting point, others have dated it a little later, at around the year 40 Hijrah, when political differences between the fourth caliph, 'Alī, and Mu'āwiyah led to military confrontation and the division of the Muslims into various factions. According to a third view, forgery in *ḥadīth* started even earlier, that is, during the caliphate of Abū Bakr when he waged the War of Apostasy (*riḍḍah*) against the refusers of *zakāh*. But the year 40 is considered the more likely starting point for the development of serious and persistent differences in the community, which is marked by the emergence of the Khārijites and the Shī'ah. Muslims were thenceforth divided, and hostility between them acquired a religious dimension when they

began to use the Qur'an and *Sunnah* in support of their claims. When the misguided elements among them failed to find any authority in the sources for their views, they either imposed a distorted interpretation on the source materials, or embarked on outright fabrication.⁹¹

The attribution of false statements to the Prophet may be divided into two types: (1) deliberate forgery, which is usually referred to as *ḥadīth mawḍūʿ*; (2) unintentional fabrication, which is known as *ḥadīth bāṭil* and is due mainly to error and recklessness in reporting. For example, in certain cases it is noted that the chain of narrators ended with a Companion or a Successor only, but the transmitter extended it directly to the Prophet. The result is all the same, and fabrication whether deliberate or otherwise must in all cases be abandoned.⁹² Our present discussion is, however, mainly concerned with deliberate fabrication in *ḥadīth*.

The initial forgery in *ḥadīth* is believed to have occurred in the context of personality cult literature (*faḍā'il al-ashkhās*) which aimed at crediting (or discrediting) leading political figures with exaggerated claims. The earliest forgery in this context, according to the Sunnis, was committed by the Shī'ah. This is illustrated by the *ḥadīth* of Ghadr Khumm in which the Prophet is quoted to have said, "Ali is my brother, executor and successor. Listen to him and obey him." A similar statement attributed to the Prophet is as follows: 'Whoever wishes to behold Adam for his knowledge, Noah for his piety, Abraham for his gentleness, Moses for his commanding presence and Jesus for his devotion to worship – let him behold 'Ali.'⁹³

There are numerous fabricated *ḥadīth* condemning Mu'āwiyah, including, for example, the one in which the Prophet is quoted to have ordered the Muslims, 'When you see Mu'āwiyah on my pulpit, kill him.' The fanatic supporters of Mu'āwiyah and the Umayyad dynasty are, on the other hand, known to have fabricated *ḥadīth* such as 'The trusted ones are three: I, Gabriel and Mu'āwiyah.'⁹⁴

The Khārijites are on the whole considered to have avoided fabricating *ḥadīth*, which is due mainly to their belief that the perpetrator of a grave sin is no longer a Muslim. Since they saw the fabrication of *ḥadīth* in this light, they avoided indulgence in forgery as a matter of principle and a requirement of their doctrine.⁹⁵ A group of heretic factions known as *Zanādiqah* (pl. of *zindīq*), owing to their hatred of Islam, fabricated *ḥadīth* which discredited Islam in the view of its followers. Included among such are: 'Eggplants are a cure for every illness' and 'Beholding a good-looking face is a form of 'ibādah'. It is reported that just before his execution, one of the notorious

fabricators of *ḥadīth*, 'Abd al-Karīm ibn Abī al-'Awja', confessed that he had fabricated 4,000 *ḥadīth* in which *halāl* was rendered *ḥarām* and *ḥarām* was rendered *halāl*. It has been further reported that the *Zanādiqah* fabricated a total of 14,000 *ḥadīth*,⁹⁶ a report which may or may not be credible. For a statement of this nature tends to arouse suspicion as to its veracity; even in fabricated matters, it is not an easy task to invent such a vast number of *ḥadīth* on the subject of *halāl* and *ḥarām*. Perhaps exaggerated figures of this order were quoted mainly for their subversive value.

Racial, tribal and linguistic fanaticism was yet another context in which *ḥadīth* were fabricated. Note, for example, the following: 'Whenever God was angry, He sent down revelation in Arabic, but when contented, He chose Persian for this purpose.' The Arab fanatic also matched this anathema by claiming that 'whenever God was angry he sent down revelation in Persian, but when contented He chose to speak in Arabic'.⁹⁴ These and other similar forgeries relating to the virtues or superiority of certain tribes, cities, and periods of time over others have been isolated by the 'ulamā' of *ḥadīth* and placed in the category of *al-mawḍū'āt*.⁹⁶

Known among the classes of forgers are also professional storytellers and preachers (*al-quṣṣāṣ wa'l-wā'izūn*), whose urge for popularity through arousing an emotional response in their audience led them to indulge in forgery. They made up stories and attributed them to the Prophet. It is reported that once a story-teller cited a *ḥadīth* to an audience in the mosque on the authority of Aḥmad ibn Ḥanbal and Yahyā ibn Ma'in which runs as follows: 'Whoever says "There is no god but God", God will reward him, for each word uttered, with a bird in Paradise, with a beak of gold and feathers of pearls.' At the end of his sermon, the speaker was confronted by Aḥmad ibn Ḥanbal and Yahyā ibn Ma'in who were present on the occasion and told the speaker that they had never related any *ḥadīth* of this kind.⁹⁷

Juristic and theological differences constitute another theme of forgery in *ḥadīth*. This is illustrated by the following statement attributed to the Prophet: 'Whoever raises his hands during the performance of *ṣalāh*, his *ṣalāh* is null and void.' In yet another statement we read: 'Whoever says that the Qur'an is the created speech of God becomes an infidel [...] and his wife stands divorced from him as of that moment.'

Another category of fabricated *ḥadīth* is associated with the religious zeal of individuals whose devotion to Islam led them to the careless ascription of *ḥadīth* to the Prophet. This is illustrated by the forgeries

committed by one Nūh ibn Abī Maryam on the virtues of the various sūras of the Qur'ān. He is said to have later regretted what he did and explained that he fabricated such *ḥadīth* because he saw people who were turning away from the Qur'ān and occupying themselves with the *fiqh* of Abū Ḥanīfah and the battle stories of Muḥammad ibn Ishāq. Numerous other names occur in the relevant literature, including those of Ghulām Khalīl and Ibn Abī 'Ayyāsh of Baghdad, who were both known as pious individuals, but who invented *ḥadīth* on the virtues of certain words of praise (*adhkār wa-awwād*) and other devotional matters.¹⁰⁰

Without wishing to go into details, other themes on which *ḥadīth* forgery has taken place include the urge on the part of courtiers who distorted existing *ḥadīth* to please and flatter their overlords. Similarly, the desire to establish the permissibility or virtue of certain varieties of food, beverages, clothes and customary practices led individuals to introduce exaggerations and arbitrary changes in the *ḥadīth*.¹⁰¹

Just as the 'ulama' classified *ḥadīth* into various categories in order to identify its strength and weakness from various viewpoints, they also identified the signs of forgery in *ḥadīth* from the viewpoints respectively of transmission (*isnād*) and subject-matter (*matn*), and these may be summarised as follows:

(1) Signs of forgery in transmission (*isnād*) are identified mainly by reference to the reputation and biography of the transmitters. There is a wealth of literature on the names and biographies of the transmitters of *ḥadīth* and those who are known to have indulged in lying and forgery. This information would normally be the first point of reference in identifying the signs of forgery in a particular *ḥadīth*. Another useful tool in identifying forgery in the *isnād* is to ascertain the time factor and dates in the transmission of *ḥadīth*. This is achieved by verifying whether the reporter has actually met the person he has quoted as his immediate source. It is not unknown to the scholars of *ḥadīth* to discover that the two persons involved had either lived in distant localities or that the personal contact between them was actually impossible. When the transmitters mention, for example, that he heard so and so in such and such a place reporting such *ḥadīth*, then the question of geographical location and of verifying the facts as to whether they lived in the same period or generation becomes of vital significance. The branches of the science of *ḥadīth* known as 'ilm al-*tabaqāt* (genealogy) and *asma' al-rijāl* (personal biographies) pay particular attention to the dates of birth, dates of transmission, residence and pupillage, and the information they provide is particularly

useful in tracing the signs of forgery in the narration of *ḥadīth*. And, lastly, signs of forgery in transmission are also detected by reference to personal interest and motive. An example of this is the so-called *ḥadīth* narrated by Muḥammad ibn al-Ḥajjāj al-Nakhā'i which reads that 'cookies [*al-ḥarīṣah*] strengthen the spine', and *al-ḥarīṣah* is exactly what he used to sell.

(2) Signs of forgery in the text (*matn*) of a *ḥadīth* are identified by reference to at least seven factors as follows.

Firstly, the language of the *ḥadīth* and the standards of the discourse in which it is conveyed can sometimes provide a clue as to its veracity. Prophetic language is characteristically known for its eloquence and style. Speech of a particularly crude variety and style is taken as a sign of forgery.

Secondly, corruption in the purpose and meaning of a reported *ḥadīth* also provides evidence of its fabrication. The report, for example, that 'the ark of Noah circumambulated the Ka'bah at the end', or the report that 'God created the horse and raced it first and then created Himself from it' are evidently unreasonable and corrupt, and obviously cannot be accepted.

Thirdly, statements that stand in clear opposition to the Qur'ān in such a way that no reasonable compromise and interpretation can be attempted are usually rejected. The so-called *ḥadīth*, for example, that 'the offspring of *zinā* shall not enter paradise for seven generations' was rejected by the Prophet's widow 'Ā'ishah, as it violated the clear text of the Qur'ān that 'no soul shall carry the burden of another soul' (al-An'ām, 6: 164).

ولا تزر وازرة زر أخرى

Similarly, the report 'Whoever begets a child and names him Muḥammad, he and his offspring shall go to paradise' is clearly in conflict with numerous Qur'ānic promises of reward for good work and punishment for corruption and evil.

Fourthly, a report may be unhistorical and fail to qualify the test of historical reality. The *ḥadīth*, for example, which is transmitted by Sa'd ibn Mu'adh and Mu'āwiyah that 'the Prophet imposed *jiṣyah* [poll tax] on the Jews of Khaybar and relieved them of hardship [prospects of war]' is discredited on account of historical facts that *jiṣyah* was not known at that time and that the Qur'ānic ruling on it was only revealed in the year of Tabūk, and that Sa'd ibn Mu'adh had died before this last event. In yet another report, Anas ibn Mālīk

stated that, 'I entered the bath and saw the Prophet wearing a wrapper and said: O Anas, I have forbidden entry to the public bath without a wrapper.' The facts of history show, on the other hand, that the Prophet never entered a public bath and that they did not exist in Medina at the time.

Fifthly, *ḥadīth* may smack of scholastic fanaticism such as the report by Ḥabban ibn Juwayn that 'I heard 'Alī saying that I and the Prophet worshipped God six or seven years before anyone of this Ummah.' It is known that Ḥabban was a fanatic Shi'ī and careless in the treatment of *ḥadīth*.

Sixthly, when a *ḥadīth* is supposed to have been known to vast numbers of people and yet only one person reported it, the fact that no one else has confirmed it is taken as a sign of forgery. An example of this can be found in our discussion of the *āḥād ḥadīth* below.

And lastly, when the *ḥadīth* in question promises a disproportionate reward or an exceedingly severe punishment for a small act that does not warrant the stipulated consequence, forgery is suspected. Note, for example, the report 'Anyone who says "There is no god but God", God will create for him a bird with 70,000 tongues each of which speaks 70,000 languages and will be praying for him.'¹⁰²

These are some of the main, although not all, indicators of forgery in *ḥadīth*. Those who are particularly learned in *ḥadīth* may be able to detect signs of forgery in other different ways that might be peculiar to their ability and understanding of the subject-matter of their investigation.

III. Classification and Value (B)

From the viewpoint of the continuity and completeness of its chains of transmitters, the *ḥadīth* is once again classified into two categories: continuous (*muttasil*) and discontinued (*ghayr muttasil*). A continuous *ḥadīth* is one which has a complete chain of transmission from the last narrator all the way back to the Prophet. A discontinued *ḥadīth*, also known as *muṣal*, is a *ḥadīth* whose chain of transmitters is broken and incomplete. The majority of 'ulamā' have divided the continuous *ḥadīth* into the two main varieties of *mutawāṭir* and *āḥād*. To this the Hanafīs have added an intermediate category, namely the 'well-known', or *maṣhūr*.

III.1 The Continuous *Ḥadīth*

(a) The *mutawāṭir*

Literally, *mutawāṭir* means 'continuously recurrent'. In the present context, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility is inconceivable owing to their large number, diversity of residence, and reliability.¹⁰³ A report would not be called *mutawāṭir* if its contents were believed on other grounds, such as rationality and axiomatic knowledge.¹⁰⁴ A report is classified as *mutawāṭir* only when it fulfils the following conditions.

(1) The number of reporters in every period or generation must be large enough to preclude their collusion in propagating falsehood. Should the number of reporters in any period fall short of a reliable multitude, their report does not establish positive knowledge and is therefore not *mutawāṭir*.¹⁰⁵ Some 'ulamā' have attempted to specify a minimum, varying from as low as four to as many as twenty, forty and seventy up into the hundreds. All of these figures are based on analogies. The requirement of four is based on the similar number of witnesses that constitutes legal proof; twenty is analogous with the Qur'ānic *āyah* in sūra al-Anfāl (8:65) which reads: 'If there are twenty steadfast men among you, they will overcome two hundred [fighters].'

إن يكن منكم عشرون صابرون يغلبوا مائتين

The next number, that is seventy, represents an analogy with another Qur'ānic passage where we read that 'Moses chose seventy men among his people for an appointment with Us' (al-A'rāf, 7:155).

واختار موسى قومه سبعين رجلا لميقاتنا

Some have drawn an analogy with the number of participants in the battle of Badr. However, al-Ghazālī is representative of the majority opinion when he observes that all of these analogies are arbitrary and have no bearing on the point. Certainty is not necessarily a question of numbers; it is corroborative evidence, the knowledge and trustworthiness of reporters, which must be credited even in cases where the actual number of reporters is not very large.¹⁰⁶ Thus, when a reasonable number of persons report something which is supported by other evidence, their report may amount to positive knowledge.¹⁰⁷

(2) The reporters must base their report on sense perception. If,

therefore, a large number of people report that the universe is created, their report would not be *mutawātir*. The report must also be based on certain knowledge, not mere speculation. If, for example, the people of Islamabad inform us of a person they thought was Zayd, or a bird they thought was a pigeon, neither would amount to certainty.¹⁰⁸

(3) Some 'ulamā' have advanced the view that the reporters must be upright persons ('*ādil*'), which means that they must be neither infidels nor profligates (*kuffār wa-fussāq*). The correct view, however, is that neither of these conditions is necessary. What is essential in *mutawātir* is the attainment of certainty, and this can be obtained through the reports of non-Muslims, profligates and even children who have reached the age of discernment, that is, between seven and fifteen. The position is, of course, entirely different with regard to solitary *ḥadīth*, which will be discussed later.¹⁰⁹

(4) The reporters should not be biased in their cause or associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the report to the very end.¹¹⁰

What is the value (*ḥukm*) of the *mutawātir*? According to the majority of 'ulamā', the authority of a *mutawātir ḥadīth* is equivalent to that of the Qur'ān. Universal continuous testimony (*tawātur*) engenders certainty (*yaqīn*) and the knowledge that it creates is equivalent to knowledge that is acquired through sense-perception. Most people, it is said, know their forefathers by means of *mutawātir* reports just as they know their children through sense-perception. Similarly, no one is likely to deny that Baghdad was the seat of the caliphate for centuries, despite their lack of direct knowledge to that effect. According to a minority view, *mutawātir* imparts satisfaction (*ṣuma'ninah*) but not *yaqīn*, which means that doubt is not totally eliminated. It is then noted that a *mutawātir* consists of a multitude of *āḥād* put together, and each of the *āḥād*, if taken individually, is liable to doubt. The element of doubt, in other words, is not eliminated. Abū Zahrah observed that the basic logic of this view finds support in actual reality as we do find untrue reports are sometimes transmitted by multitudes of people across generations.¹¹¹

When the reports of a large number of transmitters of *ḥadīth* concur in their purport but differ in wording or in form, only their common meaning is considered *mutawātir*. This is called *mutawātir bi'l-ma'nā*, or conceptual *mutawātir*. Examples of this kind of *mutawātir* are numerous in the *ḥadīth*. Thus the verbal and actual *Sunnah* which

explain the manner of performing the obligatory prayers, the rituals of *ḥajj*, fasting, the quantities of *zakāh*, rules relating to retaliation (*qisās*) and the implementation of *ḥudūd*, etc., all constitute conceptual *mutawātir*. A large number of the Companions witnessed the acts and sayings of the Prophet on these matters, and their reports have been transmitted by multitudes of people throughout the ages.¹¹² The other variety of *mutawātir*, which is of rare occurrence compared to the conceptual *mutawātir*, is called *mutawātir bi'l-lafẓ*, or verbal *mutawātir*. In this type of *mutawātir*, all the reports must be identical on the exact wording of the *ḥadīth* as they were uttered by the Prophet himself. For example the *ḥadīth* which reads: 'Whoever lies about me deliberately must prepare himself for a place in Hell-fire.'¹¹³

من كذب علي متعمداً فليتبوأ مقعده من النار.

The exact number of verbal *mutawātir* is a subject of disagreement, but it is suggested that it does not exceed ten *ḥadīth*.¹¹⁴

(b) The *mashhūr* (well-known) *ḥadīth*

The *mashhūr* is defined as a *ḥadīth* which is originally reported by one, two or more Companions from the Prophet or from another Companion, but has later become well-known and transmitted by an indefinite number of people. It is, in other words, an *āḥād ḥadīth* to begin with, but became widely known in the second century, that is, after the period of the Companions. It is necessary that the diffusion of the report should have taken place during the first or the second generation following the demise of the Prophet, not later. This would mean that the *ḥadīth* became widely known during the period of the Companions or the Successors. It is argued that after this period, all the *ḥadīth* became well-known, in which case there will be no grounds for distinguishing the *mashhūr* from the general body of *ḥadīth*.¹¹⁵

For Abū Ḥanīfah and his disciples, the *mashhūr ḥadīth* imparts positive knowledge, albeit of a lesser degree of certainty than *mutawātir*. But the majority of non-Ḥanafī jurists consider *mashhūr* to be included in the category of solitary *ḥadīth*, and that it engenders speculative knowledge only. According to the Ḥanafīs, acting upon the *mashhūr* is obligatory but its denial does not amount to disbelief.¹¹⁶ The difference between the *mutawātir* and *mashhūr* lies mainly in the fact that every link in the chain of transmitters of the *mutawātir* consists of a plurality of reporters, whereas the first link in the case of

mashhūr consists of one or two Companions only. As for the remaining links in the chain of transmitters, there is no difference between the *mutawātir* and *mashhūr*. Examples of the *mashhūr ḥadīth* are those which are reported from the Prophet by a prominent Companion and then transmitted by a large number of narrators whose agreement upon a lie is inconceivable.¹¹⁷ The *mashhūr*, according to the Hanafis, may qualify the 'general' of the Qur'ān. Two such *ḥadīth* that have so qualified the Qur'ān are as follows: 'The killer shall not inherit'

لا يرث القاتل.

is a *mashhūr ḥadīth* which qualifies the general provisions of the Qur'ān on inheritance in *sūra al-Nisā'* (4:11). Similarly the *mashhūr ḥadīth* which states that 'a woman shall not be joined in marriage simultaneously with her paternal or maternal aunt'

لا تنكح المرأة على عمتها ولا على خالتها.

has qualified the general provisions of the Qur'ān on marriage where the text spells out the prohibited degrees of marriage and then declares: 'It is lawful for you to marry outside these prohibitions' (*al-Nisā'*, 4:24).¹¹⁸

وأحل لكم ما وراء ذلكم

The list of prohibitions provided in this *āyah* does not include simultaneous marriage with the maternal or paternal aunt of one's wife; this is supplied by the *ḥadīth*.

(c) The *āḥād* (solitary) *ḥadīth*

The *āḥād*, or solitary, *ḥadīth* (also known as *khābar al-wāḥid*) is a *ḥadīth* which is reported by a single person or by odd individuals from the Prophet. Imam Shāfi'i refers to it as *khābar al-khāṣṣah*, as opposed to *khābar al-'āmmah*, which applies to every report narrated by one, two or more persons from the Prophet but which fails to fulfil the requirements of either the *mutawātir* or the *mashhūr*.¹¹⁹ It is a *ḥadīth* which does not impart positive knowledge on its own unless it is supported by extraneous or circumstantial evidence. This is the view of the majority, but according to Imam Ahmad ibn Ḥanbal and others, *āḥād* can engender positive knowledge.¹²⁰ Some 'ulamā' have rejected it on the basis of an analogy they have drawn with a provision of the

law of evidence, namely that the testimony of one witness falls short of legal proof. Those who unquestioningly accept the authority of *āḥād*, such as the Zāhiri school, maintain that when the Prophet wanted to deliver a ruling in regard to a particular matter, he did not invite all the citizens of Medina to attend. The majority of jurists, however, agree that *āḥād* may establish a rule of law provided that it is related by a reliable narrator and the contents of the report are not repugnant to reason.¹²¹ Many 'ulamā' have held that *āḥād* engenders speculative knowledge, acting upon which is preferable only. In the event where other supportive evidence can be found in its favour, or when there is nothing to oppose its contents, then acting upon *āḥād* is obligatory.¹²² But *āḥād* may not, according to the majority of 'ulamā', be relied upon as the basis of belief ('*aqidah*). For matters of belief must be founded on certainty even if a conjecture (*ẓann*) may at times seem preferable.¹²³ As the Qur'ān tells us, 'Verily conjecture avails nothing against the truth' (*al-Najm*, 53: 28).

إن الظن لا يغني من الحق شيئا

Āḥād, being conjectural, does not establish the truth. The following *āyah* is often quoted in support of the *āḥād*: 'O believers, when a transgressor comes to you with any news, ascertain the truth, lest you harm people unwittingly and then regret what you have done afterwards' (*al-Hujurat*, 49:6).

يأياها الذين آمنوا إن جاءكم فاسق بنبأ فتبينوا أن تصيبوا قوما

بجهالة فتصبحوا على ما فعلتم نادمين

By way of divergent implication (*mafhūm al-mukhalafah*), it is implied that a report by an upright person is admissible. Commenting on this, al-Qurṭubī stated in his *Tafsīr* that this *āyah* is reported by a just ('*adl*') person, that reporting is in the nature of trust (*amanah*) which is not applicable to a transgressor. There is general consensus (*ijmā'*) to the effect that the report of a proven transgressor is not admissible.

The Companions generally accepted and acted upon solitary reports on numerous occasions, including the report by Abū Bakr al-Ṣiddiq of the *ḥadīth* 'Leaders are to be from the Quraysh' and also his report that 'Prophets are buried where they die.'

الأنبياء يدفنون حيث يموتون.

The Caliph 'Umar also acted upon the report by 'Abd al-Rahmān ibn 'Awf that the Prophet accepted the *jizyah* (poll tax) from the Magians, and also on Mughīrah ibn Shu'ba's report concerning the grandmother's share in inheritance. The Caliph 'Uthmān acted upon the report of Fari'ah bint Mālik concerning her probation period following the death of her husband to 'remain in her husband's house until the end of her 'idda'. And then Ibn 'Abbās accepted Abū Sa'id al-Khudri's *ḥadīth* on the prohibition of *ribā al-faḍl* (usury of excess). It is also known, nevertheless, that the Companions, especially Abū Bakr, 'Umar and 'Alī were cautious in their acceptance of *āḥād* reports.¹²⁴

According to the majority of the 'ulamā' of the four Sunni schools, acting upon *āḥād* is obligatory even if *āḥād* fails to engender positive knowledge. Thus, in practical legal matters, a preferable *ẓann* is sufficient as a basis of obligation. It is only in matters of belief where conjecture 'avails nothing against the truth'.¹²⁵ Having said this, however, *āḥād* may only form the basis of obligation if it fulfils the following requirements.

(1) The transmitter is a competent person, which means that reports communicated by a child or a lunatic of whatever age are unacceptable. Women, blind persons and slaves are considered competent for purposes of reporting the *ḥadīth*.¹²⁶

(2) The transmitter of *āḥād* must be a Muslim, which means that a report by a non-Muslim is unacceptable. However, the reporter must fulfil this condition only at the time of reporting the *ḥadīth*, but not necessarily at the time when he received the information. There are instances of *ḥadīth*, for example, reported by Companions, pertaining to the acts of the Prophet which they observed before they had professed Islam.¹²⁷

(3) The transmitter must be an upright person ('*adl*') at the time of reporting the *ḥadīth*. The minimum requirement of this condition is that the person has not committed a major sin and does not persist in committing minor ones; nor is he known for persistence in degrading profanities such as eating in the public thoroughfare, associating with persons of ill-repute or indulgence in humiliating jokes. This is sometimes referred to as acts which indicate a lapse in one's probity or *munā'ah*. A person who possess *munā'ah* is expected to behave according to what may be expected of his peers, but this may be changeable by reference to the culture and custom of society. Although the 'ulamā' are unanimous on the requirement of uprightness of character ('*adālah*'), they are not in agreement as to what

this precisely means. According to the Hanafis, a Muslim who is not a sinner (*fāsiq*) is presumed to be upright. The Shāfi'is are more specific on the avoidance of sins, both major and minor, as well as indulgence in profane *mubāḥ* acts. To the Māliki jurist Ibn al-Hājib, '*adālah* refers to piety, observance of religious duties and propriety of conduct. There is also some disagreement among the 'ulamā' on the definition of, and distinction between, major and minor sins.¹²⁸

The '*adālah* of a transmitter must be established by positive proof. Hence, when the '*adālah* of a transmitter is unknown, his report is unacceptable. Similarly, a report by an anonymous person (*riwāyah al-majhūl*), such as when the chain of transmitters reads in part that 'a man' reported such-and-such, is unacceptable. The '*adālah* of a narrator may be established by various means including *tazkiyah*, that is, when at least one upright person confirms it, or when the transmitter is known to have been admitted as a witness in court, or when a *faqīh* or a learned person is known to have relied or acted on his report. But there must be positive evidence that the *faqīh* did not do so due to additional factors such as a desire on his part merely to be cautious.¹²⁹

Tazkiyah may consist of affirmation of probity (*al-ta'dīf*) or of expunction of probity (*al-jarh*). As to the question whether the *muzakki* (one who testifies for or against the probity of a narrator of *ḥadīth* or of a witness) needs to explain the grounds of his statement, it is generally stated that there is a difference between testimony (*shahādah*) and narration (*riwāyah*). Whereas explanation of the grounds of statements/allegations is required in *shahādah*, this is not a requirement in *riwāyah*, nor in affirmative *tazkiyah*, but it is a requirement in the expunction of probity (*al-jarh*). The 'ulamā' of *ḥadīth* have confined the grounds of *al-jarh* to about ten, namely fabrication of *ḥadīth*, attribution of lies to the Prophet, gross error, negligence (*al-ghaflah*), transgression (*al-fisq*) other than lying, imagery (*al-wahm*), ignorance (*al-jahālāh*), heresy and pernicious innovation (*al-bid'ah*), bad memory, insertion of one's own statements in a report so that it causes confusion (*tadlīs al-mutā'in*), and indulgence in outlandish reporting that goes against more reliable information.¹³⁰

The criterion of '*adālah* is established for all the Companions regardless of their juristic or political views. This conclusion is based on the Qur'an which declares in a reference to the Companions that 'God is well pleased with them, as they are with Him' (al-Tawbah, 9:100).

رضي الله عنهم ورضوا عنه

A person's reputation for being upright and trustworthy also serves as a proof of his reliability. According to some 'ulamā' of *ḥadīth*, such a reputation is even more credible than confirmation by one or two individuals.¹²⁷ With regard to certain figures such as Imam Mālik, Sufyān al-Thawrī, Sufyān ibn 'Uyaynah, al-Layth ibn Sa'd, etc., their reputation for 'adālah is proof of reliability above the technicalities of *tazkiyah*.¹²⁸

(4) The narrator of *āḥād* must possess a retentive memory so that his report may be trusted. If he is known for committing frequent errors and inconsistencies, his report is unacceptable. The faculty of retention, or *ḍabt*, is the ability of a person to listen to an utterance, to comprehend its meaning as it was originally intended and then to retain it and take all necessary precautions to safeguard its accuracy. In cases of doubt in the retentiveness of a transmitter, if his report can be confirmed by the action of his predecessors, it may be accepted. But in the absence of such verification, reports by persons who are totally obscure and whose retentiveness cannot be established are unacceptable.¹²⁹

(5) The narrator should not be implicated in any form of distortion (*tadlīs*), either in the textual contents (*matn*) of a *ḥadīth* or in its chain of transmitters (*isnād*). Distortion in the text is to add to the saying of the Prophet elements which did not exist, or to detract from its original content so as to distort its purport and mislead the listener. *Tadlīs* in the *isnād* is to tamper with the names and identity of narrators, which is, essentially, not very different from outright forgery.¹³⁴ One form of *tadlīs* is to omit a link in the chain of narrators. The motive for such omission is immaterial. Sometimes it is observed, for example, that a single weak link in an otherwise reliable chain of transmitters is omitted with a view to showing the *isnād* reliable in every part. Whatever the motive may be, a *tadlīs* of this kind is, for all intents and purposes, equivalent to forgery. However, if the narrator is a prominent scholar of irreproachable reputation, his report is normally accepted, notwithstanding a minor omission in the chain of *isnād*.¹³⁵

(6) The transmitter of *āḥād* must, in addition, have met with and heard the *ḥadīth* directly from his immediate source. The contents of the *ḥadīth* must not be outlandish (*shādhah*) in the sense of being contrary to the established norms of the Qur'ān and other principles

of *Sharī'ah*. In addition, the report must be free of subtle errors, such as rendering *ab* as *ibn* ('father' as 'son'), or other such words that are similar in appearance but differ in meaning.¹³⁶

With regard to the wording in which the Companion has narrated the *ḥadīth*, the 'ulamā' have identified a number of Arabic expressions which indicate, on a descending scale, the strength and reliability of transmission. Thus, when a Companion reports that, 'I heard – *sami'tu* – The Messenger of God saying such and such', it is more specific than saying that, 'The Prophet said [*qāla rasūl Allāh*] so and so'. This latter expression is, in turn, stronger than such other terms as 'The Messenger of God commanded such and such or prohibited such and such – *amara rasūl Allāh bi-kadhā wa nahā 'an kadhā*, or that 'he ordered such and such and forbade us from such and such – *amara bi-kadhā wa nahaynā 'an kadhā*. And even this last expression is deemed to be a degree stronger than merely saying that 'the *Sunnah* is such and such – *inna as-sunnata kadhā*. Weaker still is when a Companion simply reports something 'from the Prophet – *'an an-nabi'*. And lastly, when a Companion relates, 'We used to do such and such when the Prophet was alive'.

The three Imams, Abū Ḥanīfah, al-Shāfi'ī and Aḥmad ibn Ḥanbal, rely on *āḥād* when it fulfils the foregoing conditions. Abū Ḥanīfah, however, laid down certain additional conditions, one of which is that the narrator's action must not contradict his narration. It is on this ground, for example, that Abū Ḥanīfah does not rely on the following *ḥadīth*, narrated by Abū Hurayrah: 'When a dog licks a dish, wash it seven times, one of which must be with clean sand.'¹³⁷

إذا ولغ الكلب في إناء أحدكم فليغسله سبعة إحداهن
بالتراب الطاهر.

Abū Ḥanīfah has explained this by saying that Abū Hurayrah did not act upon it himself and has, in fact, given a *fatwā* that the dish so licked should be washed only three times. But this is only when the divergent act or *fatwā* is after the initial report and not before.¹³⁸ Another example is the *ḥadīth* reported by 'Ā'ishah to the effect that 'marriage of a woman is invalid without the permission of her guardian [*walī*]'.

لَمَّا امْرَأَةٌ نَكَحَتْ بَغِيرَ إِذْنٍ وَلَيْهَا فَكَاحَهَا بَاطِلٌ.

The Hanafis do not act on this because 'Ā'ishah acted to the contrary when she contracted the *nikāh* of her niece, the daughter of 'Abd al-Rahmān, while he was absent in Syria. The majority do not agree with Hanafis because the narrator's divergent act could be due to forgetfulness, or because he acted on his mistaken *ijtihād*, neither of which warrant departure from the *ḥadīth*. The Hanafis further require that the subject-matter of *āḥād* is not such that would necessitate the knowledge of a vast number of people. If, for example, we are informed, by means of a solitary report, of an act or saying of the Prophet which was supposed to be known by hundreds or thousands of people and yet only one or two reported it, such a *ḥadīth* is not reliable. The *ḥadīth*, for example, that 'anyone who touches his sexual organ must make a fresh ablution'¹³⁹

إِذَا مَسَّ أَحَدُكُمْ ذَكَرَهُ فَلْيَتَوَضَّأْ.

is not accepted by the Hanafis. The Hanafis have explained that, had this *ḥadīth* been authentic, it would have become an established practice among all Muslims, which is not the case. The *ḥadīth* is therefore not reliable. The majority of 'ulamā', however, do not insist on this requirement.¹⁴⁰ The Hanafis have similarly not acted on three other *ḥadīth*, one of which requires a fresh ablution (*wuḍū'*) following consumption of food that is cooked by fire, and the other which requires the same after carrying a funeral, and the third which requires that *tamiyah* (i.e. reciting *bismillāh al-rahmān al-rahīm* in *ṣalāh*) should be recited aloud. None of these are reliable, according to the Hanafis, for if they were, people would have acted on them. The *jumhūr* are once again in disagreement on the analysis that people often witness an event, or hear about it, but do not necessarily report what they have seen. The fact, therefore, that a *ḥadīth* pertaining to a matter of common occurrence is reported only by one or a few individuals is not conclusive evidence that the *ḥadīth* is unreliable.

And finally, the Hanafis maintain that when the narrator of *āḥād* is not a *faqīh*, his report is accepted only if it agrees with the general principles of *Shari'ah* and *qiyās*, otherwise *qiyās* would be given priority over *āḥād*. However, if the narrator is known to be a *faqīh*, then his report will be preferred over *qiyās*. It is on this ground, for example, that the Hanafis have rejected the *ḥadīth* of *muṣarrāt*, that

is, the animal whose milk is retained in its udders so as to impress the buyer. The *ḥadīth* is as follows: 'Do not retain milk in the udders of a she-camel or goat so as to exaggerate its yield. Anyone who buys a *muṣarrāt* has the choice, for three days after having milked it, either to keep it, or to return it with a quantity [i.e. a *ṣā'*] of dates.'¹⁴¹

لَا تَصْرُوا فِي الْإِبِلِ وَالْغَنَمِ، مَنْ ابْتَاعَ شَاةَ مَصْرَاةٍ فَهُوَ بِالْخِيَارِ

ثَلَاثَةَ أَيَّامٍ، إِنْ شَاءَ رَدُّهَا وَرَدَّ مَعَهَا صَاعًا مِنَ التَّمْرِ.

The Hanafis regard this *ḥadīth* to be contrary to *qiyās*, that is, to analogy with the rule of equality between indemnity and loss. Abū Ḥanīfah has held the view that a *ṣā'* of dates may not be equal in value to the amount of milk the buyer has consumed; thus, if the buyer wishes to return the animal, he must return it with the cost of the milk that was in its udders at the time of purchase, not with a fixed quantity of dates. The Hanafis have added that the buyer will have consumed what belonged to him, as he has paid for and taken delivery of the animal; he is therefore not liable to compensation. The ruling of the *ḥadīth* is contrary to normal rules, which is why the Hanafis do not act on it. The majority of 'ulamā', including Mālik, Shāfi'i, Ibn Ḥanbal and the disciples of Abū Ḥanīfah, Abū Yūsuf and Zūfār, have on the other hand accepted this *ḥadīth* and have given it priority over *qiyās*. According to the majority view, the compensation may consist of a *ṣā'* of dates or of its monetary value. Dates were specified in the *ḥadīth* as it used to be the staple food in those days, which may not be the case any more.¹⁴²

Imam Mālik would rely on a solitary *ḥadīth* on condition that it did not disagree with the practice of the Medinans ('*amal ahl al-Madīnah*); he considered the standard practice of the people of Medina to be more representative of the conduct of the Prophet than the isolated report of one or two individuals. In his opinion, Medinan practice represents the narration of thousands upon thousands of people until it reaches the Prophet. It is, in other words, equivalent to a *mashhūr*, or even *mutawātir*. When an *āḥād* report contradicts the practice of the Medinans, the latter is, according to the Mālikī view, given priority over the former. The Mālikīs have thus refused to follow the *ḥadīth* regarding the option of cancellation (*khiyār al-majlis*) which provides that 'the parties to a sale are free to change their minds so long as they have not left the meeting of the contract'.

إذا تباع الرجلان فكل واحد منهما بالخيار ما لم يتفرقا.

The reason being that this *hadith* is contrary to the practice of the people of Medina.¹⁴³

A contract, according to the Mālikī school, consists of a meeting of the minds through a valid offer and acceptance, and becomes binding as of that moment. *Khiyār al-majlis* contravenes the sanctity and binding character of a contract after its conclusion; it should therefore have no effect on the finality of the contract. The Mālikīs have similarly upheld the Medinan practice of ending the *ṣalāh* with only one *salām* instead of the two that are offered by the *junhūr*. The Medinans have always practised only one *salām* and the Mālikīs have preferred this to the two pronouncements of *salām* practised by the majority. The Mālikī jurist Qāḍī 'Ayād observed that the Medinan practice either agrees or disagrees with the *āḥād ḥadīth*. If the two are in agreement, then the one supports the other and no question of preference would arise. In the event of conflict between the Medinan practice and *āḥād ḥadīth*, the former is preferred with regard to factual reports but the latter is preferred in *ijtihād* matters.

Imam Shāfi'ī laid down four conditions that the narrator of *āḥād ḥadīth* must fulfil: (1) he is pious and known for his honesty; (2) he understands the words and purpose of the *hadīth*; (3) he is retentive and remembers the *hadīth* even if he needs to refer to his notes; (4) his report does not contradict the body of *hadīth* that is known to the 'ulamā' of *hadīth*, especially when the subject is already known. These conditions must be met at every level of transmission. Imam Shāfi'ī thus emphasised that every *hadīth* must have a valid chain of transmission (*isnād*) which is connected all the way back to the Prophet himself. This is why al-Shāfi'ī does not, in principle, accept the *mursal ḥadīth*, which is basically an *āḥād ḥadīth*, albeit with a broken *isnād*, unless it meets certain conditions. The Shāfi'īs have consequently not acted on the *hadīth* reported by al-Zuhri from 'Ā'ishah where she said: 'Hafṣah was given a present of foodstuffs while both of us were fasting, but we broke the fast and ate some. Then the Prophet came and we told him that we were given a gift of foodstuffs which seemed appetising and we broke our fast. To this the Prophet said: "You should observe a belated fast on another day."'

رُوي عن عائشة (رض) قالت : أهدني لحفصة طعام وكنا صائمتين فأفطرنا، ثم دخل علينا رسول الله - صلى الله عليه وسلم - فقلنا: يا رسول الله إنا أهديت لنا هدية واشتهيناها فأفطرنا، فقال رسول الله - صلى الله عليه وسلم لا عليكم، صوما مكانه يوما آخر.

This is because al-Zuhri, who is a *tabi'ī*, reported from 'Ā'ishah without having heard it from her directly. It is held, therefore, that one who breaks a supererogatory fast is not liable to a belated performance by way of compensation.

Imam Aḥmad ibn Hanbal is basically in agreement with al-Shāfi'ī in this in that both have emphasised the *isnād*, but he differs with al-Shāfi'ī in regard to acting upon the *mursal*. Imam Aḥmad accepts in principle the *mursal*, but has nevertheless considered it to be weak, and thus it may be superseded by the *fatwā* of one of the Companions.

The general view that the *āḥād* is *ẓannī*, and may, therefore, not form the basis of 'aḥkām, is not accepted by Imam Aḥmad ibn Hanbal, for whom *āḥād* imparts positive knowledge. His disciple, Ibn Taymiyyah, qualified this by saying that *āḥād* does impart 'ilm if it is supported by other evidence, although it is basically *ẓannī*. There is no doubt, according to al-Shawkānī, and also al-Āmidī, that when *āḥād* is supported by *ijmā*, it becomes *qāṭi* and that the question of *ẓannī* and *qāṭi* in *āḥād* often depends on other supportive evidence. *Hadīth* that are recorded in al-Bukhārī and Muslim, al-Shawkānī adds, have been generally accepted by the *ummah* and this is itself supportive evidence.¹⁴⁴ All the four imams of jurisprudence have considered *āḥād* to be authoritative in principle, and none reject it unless there is evidence to suggest a weakness in its attribution to the Prophet, or which may contradict some other evidence that is more authoritative in their view.

The majority of 'ulamā' do not insist that the *āḥād* should consist of a verbatim transmission of what the narrator heard in the first place, although this is the most authoritative form of transmission in any kind of *hadīth*. They would instead accept the conceptual transmission of an *āḥād*, on condition, however, that the narrator understands

the language and purport of the *ḥadīth* in full. Only then will the rendering of the *ḥadīth* in the narrator's own words, which conveys an equivalent meaning, be acceptable. However, if the narrator does not possess this degree of knowledge and is unable to transmit the *ḥadīth* in its original form, all the four Sunni schools are in agreement that his own rendering of the concept of the *ḥadīth* is unacceptable.¹⁴⁵

Some '*ulamā*' of the Hanafi and other schools have held that conceptual transmission is totally forbidden, a view which is refuted by the majority, who say that the Companions often transmitted one and the same *ḥadīth* in varying words, and no-one can deny this. One of the most prominent Companions, 'Abd Allāh ibn Mas'ūd, is noted for having reported many *ḥadīth* from the Prophet and made it known that 'the Prophet said this, or something like this, or something very close to this'. No one has challenged the validity of this manner of reporting; thus the permissibility of conceptual transmission is confirmed by the practice of the Companions, and their consensus is quoted in its support. Having said this, however, accuracy in the transmission of *ḥadīth* and retaining it in its original version is highly recommended.¹⁴⁶ This is, in fact, the purport of a *ḥadīth* from the Prophet which reads: 'May God bless with success one who heard me saying something, and who conveys it to others as he heard it; and may the next transmitter be even more retentive than the one from whom he received it.'¹⁴⁷

نَصْرًا لِلَّهِ أَمْرًا سَمِعَ مِنْ شَيْئًا قَبْلَهُ كَمَا سَمِعَهُ. فَرَبِّ مَبْلَغٍ أَوْعَى
لَهُ مِنْ سَامِعٍ.

Sometimes the transmitter reports a *ḥadīth* but omits a part of it. The question then arises as to whether this form of transmission is permissible at all. In principle, the narrator of any type of *ḥadīth* must not omit any part that is integral to its meaning, for instance when the omitted part consists of a condition, or an exception to the main theme of the *ḥadīth*, or which makes a reference to the scope of its application. However, the narrator may omit a part of the *ḥadīth* that does not affect the meaning of the remaining part; for in this case, the *ḥadīth* at issue will be regarded, for all intents and purposes, as two *ḥadīth*. It has been a familiar practice among the '*ulamā*' to omit a part of the *ḥadīth* which does not have a bearing on its main theme. But if the omission is such that it would bring the quoted part into

conflict with its full version, then the issue will be determined, not under the foregoing, but under the rules of conflict and preference (*al-ta'ānūq wa'l-tarjīh*). In any case, the preferred practice is to not omit any part of the *ḥadīth*, as the omitted part may well contain valuable information on some point and serve a purpose that may not have occurred to the narrator himself.¹⁴⁸

In certain *ḥadīth* that are reported by a number of transmitters, there is sometimes an addition to the text of a *ḥadīth* by one transmitter which is absent in the reports of the same *ḥadīth* by others. The first point to ascertain in a discrepancy of this nature is to find out whether the *ḥadīth* in question was originally uttered on one and the same occasion or on different occasions. If the latter is the case, then there is no conflict and both versions may be accepted as they are. But if it is established that the different versions all originated in one and the same meeting, then normally the version which is transmitted by more narrators will prevail over that which is variably transmitted by one, provided that the former are not known for errors and oversight in reporting. Consequently, the additional part of the *ḥadīth* which is reported by a single transmitter will be isolated and rejected for the simple reason that error by one person is more likely in this case than by a multitude. But if the single narrator who has reported the addition is an eminently reliable person and the rest are known for careless reporting, then his version will be preferred, although some '*ulamā*' of *ḥadīth* do not agree with this. Additions and discrepancies that might be observed in the *isnād* such as when a group of narrators report a *ḥadīth* as a *mursal* – whereas one person reported it as a *musnad* (that is, a *muttaṣil*, or continuous) – will be determined by the same method that applies to discrepancy in the text. However, sometimes the preference of one version over the other may be determined on different grounds. To give an example, according to one *ḥadīth*, 'Whoever buys foodstuffs is not to sell the same before it is delivered to him.'

مَنْ أَتْبَاعَ طَعَامًا فَلَا يَبِيعُهُ حَتَّى يَسْتَوْفِيَهُ.

However, according to another report, the Prophet has issued a more general instruction according to which Muslims are 'forbidden from selling that which they do not have in their possession'.

لَا تَبِعْ مَا لَيْسَ عِنْدَكَ .

The Hanafis have preferred the second version, as it is conveyed in broader terms, which comprise foodstuffs as well as other commodities.¹⁴⁹

III.2 The Discontinued *Ḥadīth* (*al-Ḥadīth Ghayr al-Muttaṣil*)

This is a *ḥadīth* whose chain of transmitters does not extend all the way back to the Prophet. It occurs in three varieties: *mursal*, *mu'dal* and *munqaṣi'*. The *mursal*, which is the main variety of discontinued *ḥadīth*, is sometimes also referred to as *munqaṣi'*. The *mursal* is defined as a *ḥadīth* which a Successor (*tābi'*) has directly attributed to the Prophet without mentioning the last link, namely the Companion who might have narrated it from the Prophet. This is the majority definition. The Hanafis, however, have defined *mursal* as a *ḥadīth* that a reliable narrator has attributed to the Prophet while omitting a part of its *isnād*. The missing link may be a Companion or even a Successor, according to the majority, but it may be a narrator among the second generation of Successors according to the Hanafis. Since the identity of the missing link is not known, it is possible that he might have been an upright person, or not. Because of these and other similar doubts in its transmission, in principle, the 'ulamā' of *ḥadīth* do not accept the *mursal*.¹⁵⁰ According to al-Shawkānī, 'the majority of 'ulamā' of *uṣūl* have defined *mursal* as a *ḥadīth* transmitted by one who has not met with the Prophet, and yet quotes the Prophet directly. The transmitter may be a Successor or a follower (*tābi' al-tābi'*) or anyone after that'. Imam Aḥmad ibn Ḥanbal does not rely on it, nor does Imam Shāfi'i, unless it is reported by a famous Successor who is known to have met with a number of Companions. Thus, a *mursal* transmitted by prominent Successors such as Sa'id ibn al-Musayyib, al-Zuhri, 'Alqamah, Masrūq, al-Sha'bi, Hasan al-Baṣrī, Qatādaḥ, etc., is accepted, provided that it fulfils the following conditions.¹⁵¹

Firstly, that the *mursal* is supported by another and more reliable *ḥadīth* with a continuous chain of transmitters, in which case it is the latter that would represent the stronger evidence. Secondly, that one *mursal* is supported by another *mursal*, and the latter is accepted and relied upon by the 'ulamā'. Thirdly, that the *mursal* is in harmony with the precedent of the Companions, in which case it is elevated and attributed to the Prophet. The process here is called *raf'* and the *ḥadīth* is called *marfū'*. Fourthly, that the *mursal* has been approved by the

'ulamā' and a number of them are known to have relied on it. Fifthly, that the transmitter of *mursal* has a reputation not to have reported weak and doubtful *ḥadīth*. For instance, the *mursal* transmitted by Sa'id ibn al-Musayyib, or any one of the prominent Successors mentioned above, is normally acceptable.¹⁵²

When a *mursal* is strengthened in any of these ways, especially when the Successor who has reported it is a leading figure and has met with the Companions, Imam Shāfi'i will find it acceptable. But even so, if the *mursal* in question is contradicted by another *ḥadīth* which is more reliable, the latter will take priority.

The foregoing basically explains al-Shāfi'i's approach to the *mursal*. Imam Abū Ḥanīfah and Imam Mālik, on the other hand, are less stringent in their acceptance of the *mursal*. They accept not only the *mursal* which is transmitted by a Successor, but also one which is transmitted by the second generation of Followers, known as *tābi' al-tābi'*. In support of this they quote the *ḥadīth* in which the Prophet is reported to have said, 'Honour my Companions, for they are the best among you, then those who follow them and then the next generation; and then lying will proliferate.'¹⁵³

أكرموا أصحابي فإنهم خياركم ، ثم الذين يلوهم ،
ثم الذين يلوهم ، ثم يظهر الكذب.

However, both Imams Abū Ḥanīfah and Mālik add the proviso that the narrator of a *mursal* must be a leading transmitter of *ḥadīth*, failing which his report will be unacceptable. They rely on it only when they are assured of the trustworthiness of the narrator. They hold the view that when an upright and learned man is convinced about the truth and reliability of a report, he tends to link it directly to the Prophet, saying that the Prophet said such and such but, when he is not so convinced, he refers to the person from whom he received it. Examples of such *mursal* are those that are transmitted by Muḥammad ibn Ḥasan al-Shaybānī, who is a *tābi' al-tābi'* but considered to be reliable. The majority of 'ulamā' are of the view that acting upon a *mursal ḥadīth* is not obligatory.

Based on this analysis, the Mu'tazilāh considered *mursal* to be even stronger than *musnad* (connected) *ḥadīth*, a position which al-Shawkānī considered to be less than warranted. The Mālikī scholar Ibn al-Ḥājib, and Ibn al-Humām among the Hanafis, held that *mursal* is only acceptable from the leading and most reliable transmitters and no one

else. The Ḥanafī 'Isa Ibn Aban, and the Shāfi'ī scholar Tāj al-Dīn al-Subkī, stated that *mursal* is acceptable from those who lived in the first three generations: the Companions, the Successors and the Followers.¹⁵⁴

The different approaches that the leading Imams have taken toward the reliability of the *mursal* may be partially explained by the fact that Shāfi'ī and Ahmad ibn Ḥanbal lived at a further distance in time from the Prophet. Hence, they felt the need of continuity in transmission more strongly than their predecessors, Abū Ḥanīfah and Mālik.

The remaining two varieties of disconnected *ḥadīth* that need to be mentioned only briefly are the *munqatī'* and the *mu'dal*. The former refers to a *ḥadīth* whose chain of narrators has a single missing link somewhere in the middle. The *mu'dal*, on the other hand, is a *ḥadīth* in which two consecutive links are missing in the chain of its narrators. Neither of them are acceptable; and the 'ulamā' are in agreement on this.¹⁵⁵

IV. Ṣaḥīḥ, Ḥasan and Ḍa'if

From the viewpoint of their reliability, the narrators of *ḥadīth* have been graded into the following categories: (1) the Companions who are generally accepted to be reliable; (2) *thiqāt thābitūn*, or those who rank highest in respect of reliability next to the Companions; (3) *thiqāt*, or those who are trustworthy but of a lesser degree than the first two; (4) *ṣaḍūq*, or truthful, that is one who is not known to have committed a forgery or serious errors; (5) *ṣaḍūq yahim*, that is truthful but committing errors; (6) *maqbūl*, or accepted, which implies that there is no proof to the effect that his report is unreliable; (7) *majhūl*, or a narrator of unknown identity. These are followed by lower classes of persons who are classified as sinners (*fissāq*), those suspected of lying, and outright liars.¹⁵⁶

A *ḥadīth* is classified as *ṣaḥīḥ*, or authentic, when its narrators belong to the first three categories.¹⁵⁷ It is defined as a *ḥadīth* with a continuous *isnād* all the way back to the Prophet, consisting of upright persons who also possess retentive memories and whose narration is free of both obvious and subtle defects.¹⁵⁸

The *ḥasan ḥadīth* differs from the *ṣaḥīḥ* in that it may include among its narrators a person or persons who belong to the fourth, fifth or sixth grades on the foregoing scale. It is a *ḥadīth* that falls between *ṣaḥīḥ* and *ḍa'if*, and although its narrators are known for truthfulness,

retentiveness and care, they have not attained the highest degree of reliability and prominence. *Ḥadīth* scholars during the first and second centuries Hijrah did not speak of *ḥasan* as a separate category and the term seems to have been used from the time of Imam Ahmad ibn Ḥanbal and al-Bukhārī.¹⁵⁹

The weak, or *ḍa'if*, is a *ḥadīth* whose narrators do not possess the qualifications required in *ṣaḥīḥ* or *ḥasan*. It is called weak owing to a weakness that exists in its chain of narrators or in its textual contents. Its narrator is known to have had a bad memory, or his integrity and piety has been subjected to serious doubt.¹⁶⁰ There are several varieties of *ḍa'if*; *mursal* is one of them. The 'ulamā' of *ḥadīth*, including Imam Muslim, do not consider *mursal* to amount to a *ṣaḥīḥ* proof (*ḥujjah*). There are other categories of *ḍa'if*, including *shadhḍh*, *munkar* and *muḍṭarib*, which need not be elaborated here. Briefly, *shadhḍh* is a *ḥadīth* with a poor *isnād* which is at odds with a more reliable *ḥadīth*. *Munkar* is a *ḥadīth* whose narrator cannot be classified to be upright and retentive of memory; and *muḍṭarib* is a *ḥadīth* whose contents are inconsistent with a number of other reports, none of which can be preferred over the others.¹⁶¹

Other varieties of *ḍa'if* include the *mudall*, whose narrator has quoted someone he has not met or one who lived in a distant time and place. The *maqlūb* is another weak *ḥadīth* in which the name of one of narrator is substituted with another and their reports are patched up. The *mauḍū'* refers to an outright forgery, and the *matruk* to a report whose narrator is accused of lying and whose report is contrary to known principles.¹⁶²

According to the general rule, the overall acceptability of a *ḥadīth* is determined on the weakest element in its proof. Thus, the presence of a single weak narrator in the chain of *isnād* results in weakening the *ḥadīth* altogether. If one of the narrators is suspected of lying whereas all the rest are classified as trustworthy (*thiqāt*) and the *ḥadīth* is not known through other channels, then it will be graded as weak. In scrutinising the reliability of *ḥadīth*, the 'ulamā' of *ḥadīth* are guided by the rule that every *ḥadīth* must be traced back to the Prophet through a continuous chain of narrators whose piety and reputation are beyond reproach. A *ḥadīth* which does not fulfil these requirements is not accepted. A weak or *ḍa'if ḥadīth* does not constitute a *ṣaḥīḥ* proof (*ḥujjah*) and is generally rejected.

NOTES

1. Thus we read in a *hadith*, 'Whoever sets a good example [man sanna sunnatun hasanatan] – he and all those who act upon it shall be rewarded till the day of resurrection; and whoever sets a bad example [man sanna sunnatun sayyi'atan] – he and all those who follow it will carry the burden of its blame till the day of resurrection.' For details see Isnāwī, *Nihāyah*, II, 170; Shawkānī, *Inshād*, p. 33.
2. For details see Guraya, *Origins*, pp. 8ff; Hasan, *Early Development*, p. 85.
3. Sibā'ī, *al-Sunnah*, p. 47; Azami, *Studies*, p. 3.
4. The *ḍyah* in question addresses the believers in the following terms: 'Certainly you have, in the Messenger of God, an excellent example' (al-Abzāb, 33:21).
5. Shāfi'ī, *Risālah*, pp. 44–5; Sibā'ī, *al-Sunnah*, p. 50.
6. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 109, *hadith* no. 3585.
7. Shāfi'ī, *Muwāfaqāt*, III, 197; Ibn Qayyim, *Fāim*, I, 222.
8. For details see Guraya, *Origins*, p. 5.
9. Cf. Azami, *Studies*, p. 4.
10. Abū Dāwūd, *Sunan*, III, 1294, *hadith* no. 4590; Shawkānī, *Inshād*, p. 33.
11. Isnāwī, *Nihāyah*, II, 170; Shawkānī, *Inshād*, p. 33; Hītu, *Wajīz*, p. 264; Ismā'īl, *Maqādir*, p. 174.
12. Cf. Azami, *Studies*, pp. 1–3.
13. Cf. Hasan, *Early Development*, p. 48; Shabir, *Authority of Hadith*, pp. 2–3.
14. Cf. Azami, *Studies*, p. 3.
15. Shāfi'ī, *Risālah*, pp. 128–30.
16. Ibid., p. 177; Guraya, *Origins*, p. 29; Hasan, *Early Development*, pp. 49–51.
17. Guraya, *Origins*, pp. 29–34.
18. Shawkānī, *Inshād*, p. 33.
19. Khallāf, *ʿIlm*, p. 37.
20. Ghazālī, *Miṣṣaf*, I, 83.
21. Khallāf, *ʿIlm*, p. 37.
22. Shāfi'ī, *Risālah*, I, 47ff.
23. Shāfi'ī, *Muwāfaqāt*, IV, 7.
24. Shawkānī, *Inshād*, p. 36; Khallāf, *ʿIlm*, p. 38; Badrān, *Uṣūl*, p. 81.
25. Abū Dāwūd, *Sunan*, II, 406, *hadith* no. 1562; Amīdī, *Iḥkām*, III, 170.
26. Khallāf, *ʿIlm*, p. 36; Abū Zahrah, *Uṣūl*, p. 89.
27. Tabrizī, *Mishkāt*, I, 166, *hadith* no. 533; Shawkānī, *Inshād*, p. 41; Khallāf, *ʿIlm*, p. 36.
28. Abū Dāwūd, *Sunan*, I, 88, *hadith* no. 334; Badrān, *Uṣūl*, pp. 69–70.
29. Shawkānī, *Inshād*, p. 61; Badrān, *Bayān*, p. 74.
30. Cf. Ismā'īl, *Maqādir*, p. 172.
31. Shaltūt, *al-Islām*, p. 512; Khallāf, *ʿIlm*, p. 43.
32. Isnāwī, *Nihāyah*, II, 171; Hītu, *Wajīz*, p. 272. As for the report that the prominent Companion, 'Abd Allāh ibn 'Umar, used to imitate the Prophet in his natural activities too, it is held that he did so, not because it was recommended (*mandūb*), but because of his devotion and affection for the Prophet.
33. Shaltūt, *al-Islām*, p. 512; Khallāf, *ʿIlm*, p. 43.
34. In particular note sūras al-Nisā (4:3), al-Baqarah (2:282) and al-Tālāq (65:2).

35. Hītu, *Wajīz*, p. 273; Khallāf, *ʿIlm*, p. 44.
36. Shawkānī, *Inshād*, pp. 35ff; Abū Zahrah, *Uṣūl*, p. 90; Hītu, *Wajīz*, p. 273; Zubaylī, *Uṣūl*, p. 480.
37. Shaltūt, *al-Islām*, p. 513.
38. Qarāfī, *al-Furqān*, I, 205–9.
39. Hītu, *Wajīz*, p. 174; Badrān, *Bayān*, p. 41.
40. Ibid., p. 275.
41. Ibid., p. 276.
42. Shaltūt, *al-Islām*, p. 513.
43. Abū Dāwūd, *Sunan*, II, 758, *hadith* no. 2715; Ibn Qayyim, *Fāim*, II, 223.
44. Shaltūt, *al-Islām*, p. 513.
45. Qarāfī, *Sharf at al-Islām*, pp. 147–9.
46. Ibid., p. 516.
47. Shawkānī, *Inshād*, p. 36; Khallāf, *ʿIlm*, p. 44.
48. Shaltūt, *al-Islām*, p. 514.
49. Ghazālī, *Miṣṣaf*, II, 51; Badrān, *Bayān*, pp. 41–2; Mutawallī, *Mabādi'*, p. 38.
50. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 873, *hadith* no. 3067; Tabrizī, *Mishkāt*, II, 889, *hadith* no. 2945.
51. Abū Dāwūd, footnote 2534 at p. 873; Marghinānī, *Hedaya* (Hamilton's trans.), p. 610.
52. Abū Zaharah, *Abū Hanīfah*, pp. 198–9; Qarāfī, *Sharf at al-Islām*, p. 147.
53. Tabrizī, *Mishkāt*, II, 1000, *hadith* no. 3342.
54. Shaltūt, *al-Islām*, p. 516.
55. Khaṭīb, *Mughni' al-Muhtāj*, III, 442; Dīn, *al-Nafaḥah*, pp. 20–3.
56. See Qarāfī, *Sharf at al-Islām*, pp. 144–6.
57. Ibid., pp. 150–1.
58. Shaltūt, *al-Islām*, p. 511.
59. Badrān, *Uṣūl*, pp. 83–4.
60. Ibn Hanbal, *Musnad*, II, 162; Ashkar, *Tarikh*, pp. 57–8.
61. Bukhārī, *Sahih*, *Kitāb al-Mazālīm* (Bab 25), *hadith* no. 2468.
62. Shaltūt, *al-Islām*, p. 511.
63. Ibid., p. 512.
64. Cf. Shāfi'ī, *Muwāfaqāt*, IV, 3; Badrān, *Uṣūl*, p. 101.
65. Shāfi'ī, *Muwāfaqāt*, IV, 4; Sibā'ī, *al-Sunnah*, p. 377; Badrān, *Uṣūl*, p. 82.
66. Shāfi'ī, *Muwāfaqāt*, IV, 4.
67. Cf. Badrān, *Uṣūl*, p. 102.
68. While quoting al-Awzā'ī on this point, Shawkānī (*Inshād*, p. 33) concurs with the view that the *Sunnah* is an independent source of *Sharf*, and not necessarily, as it were, a commentary on the Qur'ān only. See also Shāfi'ī, *Muwāfaqāt*, IV, 4.
69. See Shāfi'ī, *Muwāfaqāt*, IV, 5.
70. Ibid. See also Sibā'ī, *al-Sunnah*, pp. 378–9.
71. Shāfi'ī, *Muwāfaqāt*, IV, 5; Bahnasawi, *al-Sunnah*, p. 306.
72. Shāfi'ī, *Muwāfaqāt*, IV, 6.
73. Sibā'ī, *al-Sunnah*, p. 379; Khallāf, *ʿIlm*, p. 39; Badrān, *Uṣūl*, p. 102.
74. Bayhaqī, *al-Sunan al-Kubrā*, III, 10.
75. Ibn Qayyim, *Fāim*, II, 233; Sibā'ī, *al-Sunnah*, p. 380; Badrān, *Uṣūl*, pp. 103–5.

76. Badrān, *Bayān*, p. 6.
77. Ibid., p. 7.
78. Ibn Qayyim, *I'lam*, II, 233; Khallāf, *Ilm*, p. 40; Sibā'i, *al-Sunnah*, p. 7.
79. Cf. Shawkānī, *Inshād*, p. 33; Sibā'i, *al-Sunnah*, p. 380.
80. Shāfi'i, *Musawfa*, IV, 7.
81. Ibid., IV, 8; Sibā'i, *al-Sunnah*, p. 383.
82. Cf. Abū Zahrah, *Uṣūl*, p. 82.
83. Shāfi'i, *Risālah*, pp. 52-3.
84. Ibid.
85. Sibā'i, *al-Sunnah*, p. 388.
86. Qurṭubī, *Tafsīr*, XVIII, 227.
87. For further discussion see chapter thirteen of this work on *maṣlahah murālah*.
88. Cf. Sibā'i, *al-Sunnah*, p. 388-90.
89. Ibid.
90. Ibid., p. 385.
91. Cf. Shabir, *Authority of Hadith*, p. 50.
92. Sibā'i, *al-Sunnah*, p. 75; Shabir, *Authority of Hadith*, p. 51.
93. Azamī, *Studies*, pp. 68-70; Hittu, *Wajīz*, p. 292.
94. For details see Sibā'i, *al-Sunnah*, pp. 76-8; Azamī, *Studies*, pp. 68-73.
95. Sibā'i, *al-Sunnah*, p. 81.
96. Ibid., p. 82.
97. Ibid., pp. 84-5; Azamī, *Studies*, p. 68; Hittu, *Wajīz*, p. 290.
98. For these and more examples see Sibā'i, *al-Sunnah*, pp. 81ff.
99. Note for example Jalāl al-Dīn al-Suyūṭī's (d. 911 AH) *al-La'āl al-Maymī'ah fī al-Aḥādīth al-Mawḍū'ah*; Shaykh 'Alī al-Qārī al-Hanafī (d. 1014 AH) *al-Mawḍū'ah al-Kabrī* and Yahyā ibn 'Alī al-Shawkānī (d. 1250 AH), *al-Fawā'id al-Majmū'ah fī al-Aḥādīth al-Mawḍū'ah*.
100. Sibā'i, *al-Sunnah*, pp. 85-7; Azamī, *Studies*, p. 69; Hittu, *Wajīz*, p. 291.
101. Ibid.
102. See for details Sibā'i, *al-Sunnah*, p. 88; Hittu, *Wajīz*, p. 29.
103. See for details Sibā'i, *al-Sunnah*, pp. 97-103.
104. Shawkānī, *Inshād*, p. 214; Aghnides, *Muhammadian Theories*, p. 40.
105. Shawkānī, *Inshād*, p. 47; Hittu, *Wajīz*, p. 294.
106. Ghazālī, *Mustaṣfā*, I, 88; Shawkānī, *Inshād*, p. 47; Hittu, *Wajīz*, p. 295.
107. Ghazālī, *Mustaṣfā*, I, 87-8 illustrates this as follows: supposing that five or six persons report the death of another, this does not amount to certainty, but when this is confirmed by seeing the father of the deceased coming out of his house while obviously grief-stricken and exhibiting signs of disturbance that are unusual for a man of his stature, then the two combined amount to positive knowledge.
108. Ghazālī, *Mustaṣfā*, I, 86; Khudārī, *Uṣūl*, p. 214.
109. Shawkānī, *Inshād*, p. 48; Hittu, *Wajīz*, p. 295.
110. Ghazālī, *Mustaṣfā*, I, 86; Shawkānī, *Inshād*, p. 48.
111. Abū Zahrah, *Abū Hanīfah*, p. 271.
112. Ismā'īl, *Nihāyah*, II, 185; Abū Zahrah, *Uṣūl*, p. 84; Khallāf, *Ilm*, p. 41.
113. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 1036, *hadith* no. 3643.
114. Badrān, *Uṣūl*, p. 78.
115. Abū Zahrah, *Uṣūl*, p. 84; Aghnides, *Muhammadian Theories*, p. 44; Shawkānī's (*Inshād*, p. 49) definition of *mashhūr*, however, includes *hadith* which became well-known as late as the second or even the third century Hijrah.
116. Abū Zahrah, *Uṣūl*, p. 84; Badrān, *Uṣūl*, p. 85.
117. Khallāf, *Ilm*, p. 41.
118. Dārimī, *Sunan*, *Kiṭāb al-Farā'id*, II, 384; Ibn Mājah, *Sunan*, II, 913, *hadith* no. 2735; Muslim, *Ṣaḥīh*, p. 212, *hadith* no. 817; Badrān, *Uṣūl*, p. 85.
119. Shāfi'i, *Risālah*, pp. 159ff; Abū Zahrah, *Uṣūl*, p. 84; Mahmassānī, *Falaḥah*, p. 74.
120. Shawkānī, *Inshād*, pp. 48-9.
121. Amīdī, *Iḥkām*, I, 161; Mahmassānī, *Falaḥah*, p. 74.
122. Shawkānī, *Inshād*, p. 47; Abū Zahrah, *Uṣūl*, p. 85.
123. Abū Zahrah, *Uṣūl*, p. 85; Hittu, *Wajīz*, p. 305. As for the *ahād* pertaining to subsidiary matters which are not essential to dogma, such as the torture of the grave ('*adhab al-qabr*'), intercession (*shafā'ah*), etc., these must be accepted and believed. Anyone who denies them is a sinner (*fāsiq*) but not a *kāfir*, as he denies something which is not decisively proven.
124. See for further details al-Zuhaylī, *Uṣūl*, pp. 464-7.
125. Badrān, *Uṣūl*, p. 217; Khudārī, *Uṣūl*, p. 227.
126. Khudārī, *Uṣūl*, p. 217.
127. Ibid., p. 216.
128. For details on the conditions of *ahād* see Shawkānī, *Inshād*, pp. 48-52; Hittu, *Wajīz*, pp. 307ff; Abū Zahrah, *Uṣūl*, p. 86; Mahmassānī, *Falaḥah*, p. 74.
129. Khudārī, *Uṣūl*, p. 217.
130. Shawkānī, *Inshād*, p. 67; Badrān, *Uṣūl*, p. 92.
131. Khudārī, *Uṣūl*, p. 217.
132. Hittu, *Wajīz*, pp. 310-13.
133. Shawkānī, *Inshād*, p. 52; Abū Zahrah, *Uṣūl*, p. 86; Badrān, *Uṣūl*, p. 93; Khudārī, *Uṣūl*, p. 218.
134. Shawkānī, *Inshād*, p. 55.
135. Khudārī, *Uṣūl*, p. 218-19.
136. Abū Zahrah, *Uṣūl*, p. 85.
137. Muslim, *Ṣaḥīh*, p. 41, *hadith* no. 119.
138. Abū Zahrah, *Uṣūl*, p. 85.
139. Tabrizī, *Mishkāt*, I, 104, *hadith* no. 319.
140. Hittu, *Wajīz*, p. 302; Badrān, *Uṣūl*, p. 95.
141. Muslim, *Ṣaḥīh*, p. 248, *hadith* no. 928.
142. Hittu, *Wajīz*, p. 304; Badrān, *Uṣūl*, pp. 97-8.
143. Shāfi'i, *Risālah*, p. 140; Muslim, *Ṣaḥīh*, p. 251, *hadith* no. 944; Abū Zahrah, *Uṣūl*, p. 85; Qurṭubī, *Bidāyah*, II, 171.
144. Ibn Taymiyyah, *Majmū'ah*, XVIII, 40; Shawkānī, *Inshād*, p. 49; Bahmassāwī, *al-Sunnah*, pp. 166-7; Zuhaylī, *Uṣūl*, p. 455.
145. Hittu, *Wajīz*, pp. 317ff; Badrān, *Uṣūl*, pp. 97-8.
146. Khudārī, *Uṣūl*, p. 229.
147. Tabrizī, *Mishkāt*, I, 78, *hadith* no. 230; Khudārī, *Uṣūl*, p. 229.
148. Khudārī, *Uṣūl*, p. 227; Hittu, *Wajīz*, pp. 319-20.

149. Tabrizi, *Mishkāt*, II, 863, *hadīth* no. 2844; Ibn Mājah, *Sunan*, II, 737, *hadīth* no. 2187; Khudari, *Uṣūl*, p. 233; Hitu, *Wajīz*, pp. 318–19.
150. Hitu, *Wajīz*, p. 316; Khudari, *Uṣūl*, p. 229; Abū Zahrah, *Uṣūl*, p. 86.
151. Shawkāni, *Iṣḥād*, p. 64; Abū Zahrah, *Uṣūl*, p. 87.
152. Badrān, *Uṣūl*, p. 100; Khudari, *Uṣūl*, p. 231; Khin, *Athar*, p. 399.
153. Shāfi'i, *Risālah*, p. 904; Isnawi, *Nihāyah*, II, 223; Tabrizi, *Mishkāt*, III, 1695, *hadīth* no. 6003.
154. *Ibid.*, p. 64; Abū Zahrah, *Uṣūl*, p. 87; Khin, *Athar*, p. 401; Zuhayli, *Uṣūl*, p. 474.
155. Azami, *Studies*, p. 43; Hitu, *Wajīz*, p. 316.
156. *Ibid.*, p. 60.
157. *Ibid.*, p. 62.
158. Shawkāni, *Iṣḥād*, p. 64; Sibā'i, *al-Sunnah*, p. 94; Hitu, *Wajīz*, p. 321.
159. Sibā'i, *al-Sunnah*, p. 95; Azami, *Studies*, p. 62.
160. *Ibid.*
161. *Ibid.*
162. Ismā'il, *Maqādir*, pp. 200–201.

CHAPTER FOUR

Rules of Interpretation I: Deducing the Law from its Sources

Introduction

To interpret the Qur'ān or the *Sunnah* with a view to deducing legal rules from the indications they provide, it is necessary that the language of the Qur'ān and the *Sunnah* be clearly understood. To be able to utilise these sources, the *mujtahid* must obtain a firm grasp of the words of the text and their precise implications. For this purpose, the 'ulamā' of *uṣūl* include the classification of words and their usages in the methodology of *uṣūl al-fiqh*. The rules that govern the origin of words, their usages and classification are primarily determined on linguistic grounds and, as such, they are not an integral part of the law or religion. But they are instrumental as an aid to the correct understanding of the *Shari'ah*.

Normally the *mujtahid* will not resort to interpretation when the text itself is self-evident and clear. But by far the greater part of *fiqh* consists of rules that are derived through interpretation and *ijtihad*. As will be discussed later, *ijtihad* can take a variety of forms, and interpretation, which aims at the correct understanding of the words and sentences of a legal text, is of crucial significance for all forms of *ijtihad*.

The function of interpretation is to discover the intention of the Lawgiver – or of any person for that matter – from his speech and actions. Interpretation is primarily concerned with the discovery of that which is not self-evident. Thus, the object of interpretation in Islamic law, as in any other law, is to ascertain the intention of the

Lawgiver with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances.¹

From the viewpoints of their clarity, scope and capacity to convey certain meaning, words have been classified into various types. With reference to their conceptual clarity, the 'ulamā' of *uṣūl* have classified words into the two main categories of 'clear' and 'unclear' words. The main purpose of this division is to identify the extent to which the meaning of a word is made clear or left ambiguous and doubtful. The significance of this classification can be readily observed in the linguistic forms and implications of commands and prohibitions. The task of evaluating the precise purport of a command is greatly facilitated if one is able to ascertain the degree of clarity (or of ambiguity) in which it is conveyed. Thus the manifest (*ẓāhir*) and explicit (*naṣṣ*) are clear words, and yet the jurist may abandon their primary meaning in favour of a different meaning as the context and circumstances may require. A word is also classified, from the viewpoint of its scope, as homonym, general, specific, absolute or qualified. This classification basically explains the grammatical application of words to concepts: whether a word imparts one or more than one meaning, whether a word is of a specific or general import, and whether the absolute application of a word to its subject-matter can be qualified and limited in scope.

From the viewpoint of their actual use, such as whether a word is used in its primary, secondary, literal, technical or customary sense, words are once again divided into the two main categories of literal (*ḥaqīqī*) and metaphorical (*majāzī*). The methodology of *uṣūl al-fiqh* tells us, for example, that commands and prohibitions may not be issued in metaphorical terms as this would introduce uncertainty in their application. And yet there are exceptions to this, such as when the metaphorical becomes the dominant meaning of a word to the point that the literal or original meaning is no longer in use.

The strength of a legal rule is, to a large extent, determined by the language in which it is communicated. To distinguish the clear from the ambiguous and to determine the degrees of clarity/ambiguity in words also helps the jurist in his efforts to resolve instances of conflict in the law. When the *mujtahid* is engaged in the deduction of rules from indications that often amount to no more than probabilities, some of his conclusions may turn out to be at odds with others. *Ijtihād* is therefore not only in need of comprehending the language of the law, but also needs a methodology and guidelines with which to resolve instances of conflict in its conclusions. We shall be taking up

each of these topics in the following pages, but it will be useful to start this section with a discussion of *ta'wīl*.

I. *Ta'wīl* (Allegorical Interpretation)

It should be noted at the outset that in Arabic there are two common words for 'interpretation', namely *tafsīr* and *ta'wīl*. The latter is perhaps closer to 'interpretation', whereas *tafsīr* literally means 'explanation'. The English equivalents of these terms do not convey the same difference between them that is indicated in their Arabic usage. 'Allegorical interpretation' is an acceptable equivalent of *ta'wīl*, but I prefer the original Arabic to its English equivalent. I propose therefore to explain the difference between *tafsīr* and *ta'wīl* and then to use *ta'wīl* as it is.

Tafsīr basically aims at explaining the meaning of a given text and deducing a *ḥukm* from it within the confines of its words and sentences.² The explanation so provided is, in other words, borne out by the content and linguistic composition of the text. *Ta'wīl*, on the other hand, goes beyond the literal meaning of words and sentences and reads into them a hidden meaning which is often based on speculative reasoning and *ijtihād*. The norm in regard to words is that they impart their obvious meaning. *Ta'wīl* is a departure from this norm, and is presumed to be absent unless there is reason to justify its application.³ *Ta'wīl* may operate in various capacities, such as specifying the general, or qualifying the absolute terms of a given text. All words are presumed to convey their absolute, general, and unqualified meanings unless there is reason to warrant a departure to an alternative meaning.

From a juridical perspective, *ta'wīl* and *tafsīr* share a basic purpose, which is to clarify the law and to discover the intention of the Lawgiver in the light of the indications given, some of which may be definite and others more remote. Both are primarily concerned with speech that is not self-evident and requires clarification. Sometimes the Lawgiver or the proper legislative authority provides the necessary explanation to a legal text. This variety of explanation, known as *tafsīr tashrī'ī*, is an integral part of the law. To this may be added *tafsīr* which is based on definitive indications in the text and constitutes a necessary and logical part of it. Beyond this, all other explanations, whether in the form of *tafsīr* or of *ta'wīl*, are of the nature of opinion and *ijtihād*, and as such do not constitute an integral part of the law. The distinction between *tafsīr* and *ta'wīl* is not always clear-cut and obvious. An

explanation or commentary on a legal text may partake of both, and the two may converge at certain points. It is nevertheless useful to be aware of the basic distinction between *tafsir* and *ta'wil*. We should also bear in mind that in the context of *uṣūl al-fiqh*, especially in our discussion of the rules of interpretation, it is *ta'wil* rather than *tafsir* with which we are primarily concerned.

The 'ulamā' of *uṣūl* have defined *ta'wil* as departure from the manifest (*ẓāhir*) meaning of a text in favour of another meaning, where there is evidence to justify the departure.⁴ *Ta'wil* that is attempted in accordance with the conditions that ensure its propriety is generally accepted, and the 'ulamā' of all ages, including the Companions, have applied it in their efforts to deduce legal rules from the Qur'an and *Sunnah*. *Ta'wil* that is properly constructed constitutes a valid basis for judicial decisions. But to ensure the propriety of *ta'wil*, it must fulfil certain conditions, which are as follows: (1) that there is some evidence to warrant the application of *ta'wil*, and that it is not founded on mere inclination or personal opinion; (2) that the word or words of a given text are amenable to *ta'wil*. In this way only certain types of words, including for example the manifest (*ẓāhir*) and explicit (*naṣṣ*), are open to *ta'wil*, but not the unequivocal (*muṣṣaṣ*) and the perspicuous (*muḥkam*). Similarly, the general (*ʿamm*) and the absolute (*muṭlaq*) are susceptible to *ta'wil* but not the specific (*khāṣṣ*) and the qualified (*muqayyad*), although there are cases where these too have been subjected to *ta'wil*; (3) that the word which is given an allegorical interpretation has a propensity, even if only a weak one, in favour of that interpretation. This condition would preclude a far-fetched interpretation that goes beyond the capacity of the words of a given text; (4) that the person who attempts *ta'wil* is qualified to do so and that his interpretation is in harmony with the rules of the language and customary or juridical usage. Thus it would be unacceptable if the word *qur'* in the Qur'anic text (al-Baqarah, 2:228) were to be given a meaning other than the two meanings which it bears, namely menstruation (*ḥayḍ*) and the clean period between menstruations (*ṭuhr*). For *qur'* cannot carry an additional meaning, and any attempt to give it one would violate the rules of the language. But *ta'wil* in the sense of a shift from the literal to the metaphorical and from the general to the specific is not a peculiarity of Arabic, in that words in any language are, in fact, amenable to these possibilities.⁵

There are two types of *ta'wil*, namely *ta'wil* that is remote and far-fetched, and relevant *ta'wil*, which is within the scope of what might be thought of as correct understanding. An example of the first

type is the Hanafi interpretation of a *ḥadith* which instructed a Companion, Firūz al-Daylamī, who professed Islam while he was married to two sisters, to 'retain [amsik] one of the two, whichever you wish, and separate from the other'.⁶

أَمْسِكْ أُبَيَّهَا شَتَّ وَفَارِقِ الْآخَرَى.

The Hanafis have interpreted this *ḥadith* to the effect that al-Daylamī was asked to contract a new marriage with one of the sisters, if they happened to have been married in a single contract of marriage but, if they had been married in two separate contracts, to retain the one whom he married first, without a contract. The Hanafis have resorted to this *ta'wil* apparently because of the *Shari'ah* rule which does not permit two women to be married in a single contract. If this were to be the case, then a new contract would be necessary with the one who was to be retained.

However, this is regarded as a remote interpretation, one which is not supported by the wording of the *ḥadith*. Besides, al-Daylamī was a new convert to Islam who could not be presumed to be knowledgeable of the rules of *Shari'ah*. Had the Prophet intended the meaning that the Hanafis have given to the *ḥadith*, the Prophet would have clarified it himself. As it is, the Hanafi interpretation cannot be sustained by the contents of the *ḥadith*, which is why it is regarded as far-fetched.⁷

Ta'wil is relevant and correct if it can be accepted without recourse to forced and far-fetched arguments. The interpretation, for example, which the majority of 'ulamā' have given to the phrase '*idhā qantum ila'l-ṣalāh*' ('when you stand for prayers') in the Qur'anic text concerning the requirement of ablution for *ṣalāh* (al-Mā'idah, 5:6) to mean 'when you intend to pray' is relevant and correct; for without it, there would be some irregularity in the understanding of the text. The passage under discussion reads, in the relevant part: 'O believers, when you stand for *ṣalāh*, wash your faces and your hands up to the elbows.'

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قُمْتُمْ إِلَى الصَّلَاةِ فَاغْسِلُوا وُجُوهَكُمْ وَأَيْدِيَكُمْ إِلَى الْمَرَافِقِ

'When you stand for *ṣalāh*' here is understood to mean 'when you intend to perform *ṣalāh*'. The fact that ablution is required before entering the *ṣalāh* is the proper interpretation of the text, as the

Lawgiver could not be said to have required the faithful to perform the ablution after having started the *ṣalāh*.⁸

To set a total ban on *ta'wīl*, and to always try to follow the literal meaning of the Qur'an and *Sunnah*, which is what the *Zāhirs* have tended to do, is likely to lead to a departure from the spirit of the law and its general purpose. It is, on the other hand, equally valid to say that interpretation must be attempted carefully and only when it is necessary and justified, for otherwise the law could be subjected to arbitrariness and abuse. A correct interpretation is one for which support can be found in the *muṣṣaṣ*, in analogy (*qiyās*), or in the general principles of the law. Normally a correct interpretation does not conflict with the explicit injunctions of the law, and its accuracy is borne out by the contents of the text itself.⁹

II. Classification (A): Clear and Unclear Words

From the viewpoint of clarity (*wuḍūh*), words are divided into the two main categories of clear and unclear words. A clear word conveys a concept that is intelligible without recourse to interpretation. A ruling which is communicated in clear words constitutes the basis of obligation, without any recourse to *ta'wīl*. A word is unclear, on the other hand, when it lacks the foregoing qualities: the meaning it conveys is ambiguous/incomplete, and requires clarification. An ambiguous text that is in need of clarification cannot constitute the basis of action. The clarification so required can only be supplied through extraneous evidence, for the text itself is deficient and fails to convey a complete meaning without recourse to evidence outside its contents. A clear text, on the other hand, is self-contained, and needs no recourse to extraneous evidence. From the viewpoint of the degree of clarity and conceptual strength, clear words are divided into four types in a ranking which starts with the least clear, namely the manifest (*ẓāhir*) and then the explicit (*naṣṣ*), which commands greater clarity than the *ẓāhir*. This is followed by the unequivocal (*mufassar*) and finally the perspicuous (*muhkam*), which ranks highest in respect of clarity. And then from the viewpoint of the degree of ambiguity in their meaning, words are classified, once again, into four types which start with the least ambiguous and end with the most ambiguous in the range.

As to unclear words (*al-alfāz ghayr al-wāḍiḥah*), these are words which do not by themselves convey a clear meaning without the aid of additional evidence that may be furnished by the Lawgiver Himself,

or by the *mujtahid*. If the inherent ambiguity is clarified by means of research and *ijtihad*, the words are classified as *khafī* (obscure) and *mushkil* (difficult). But when the ambiguity can only be removed by an explanation which is furnished by the Lawgiver, the word is classified either as *mujmal* (ambivalent) or *mutashābih* (intricate).¹⁰ This is not to say, however, that the *ijtihad* does not apply to *mujmal*, for even in cases where an authoritative explanation to *mujmal* can only be provided by the Lawgiver, the '*ulamā*' have often given an *ijtihad*. Unclear words occur in four varieties.

We shall begin with an exposition of the clear words and then discuss the unclear words.

II.1 The *Zāhir* and the *Naṣṣ*

The manifest (*ẓāhir*) is a word which has a clear meaning and yet is open to *ta'wīl*, primarily because the meaning it conveys is not in harmony with the context in which it occurs. It is a word that has a literal/original meaning of its own but which leaves open the possibility of an alternative interpretation. For example, the word 'lion' in the sentence 'I saw a lion' is clear enough, but it is possible, although less likely, that the speaker might have meant a brave man. *Zāhir* has been defined as a word or words which convey a clear meaning, while this meaning is not the principal theme of the text in which they appear.¹¹

When a word conveys a clear meaning that is also in harmony with the context in which it appears, and yet is still open to *ta'wīl*, it is classified as *naṣṣ*. The distinction between the *ẓāhir* and *naṣṣ* mainly depends on their relationship with the context in which they occur. *ẓāhir* and *naṣṣ* both denote clear words, but the two differ in that the former does not constitute the dominant theme of the text whereas the *naṣṣ* does. These may be illustrated in the Qur'anic text concerning polygamy, as follows: 'And if you fear that you cannot treat the orphans justly, then marry of the women who seem good to you, two, three or four' (al-Nisā', 4:3).

وإن خفتم ألا تقسطوا في اليتامى فانكحوا ما طاب لكم
من النساء مثنى وثلاث ورباع

Two points constitute the principal theme of this *āyah*, one of which is that polygamy is permissible, and the other that it must be limited

to the maximum of four. We may say therefore that these are the explicit rulings (*naṣṣ*) of this text. But this text also establishes the legality of marriage between men and women, especially in the part where it reads 'marry of the women who seem good to you'. However, legalising marriage is not the principal theme of this text, but only a subsidiary point. The main theme is the *naṣṣ* and the incidental point is the *zāhir*.¹²

The effect of the *zāhir* and the *naṣṣ* is that their obvious meanings must be followed and action upon them is obligatory unless there is evidence to warrant recourse to *ta'wīl*, that is, to a different interpretation which might be in greater harmony with the intention of the Lawgiver. For the basic rules of interpretation require that the obvious meanings of words should be accepted and followed unless there is a compelling reason for abandoning the obvious meaning. When we say that the *zāhir* is open to *ta'wīl*, it means that when the *zāhir* is general, it may be specified, and when it is absolute, it may be restricted and qualified. Similarly, the literal meaning of the *zāhir* may be abandoned in favour of a metaphorical meaning. And, finally, the *zāhir* is susceptible to abrogation which, in the case of the Qur'ān and *Sunnah*, could only occur during the lifetime of the Prophet. An example of the *zāhir* which is initially conveyed in absolute terms but has subsequently been qualified is the Qur'ānic text (al-Nisā', 4:24) which spells out the prohibited degrees of relationship in marriage. The text then continues, 'And lawful to you are women other than these, provided you seek them by means of your wealth and marry them properly.'

وأحل لكم ما وراء ذلكم أن تبتغوا بأموالكم محصنين

The passage preceding this *āyah* refers to a number of female relatives with whom marriage is forbidden, but there is no reference anywhere in this passage either to polygamy or to marriage with the paternal and maternal aunt of one's wife. The apparent or *zāhir* meaning of this passage, especially in the part where it reads 'and lawful to you are women other than these' would seem to validate polygamy beyond the limit of four, and also marriage to the paternal and maternal aunt of one's wife. However, the absolute terms of this *āyah* have been qualified by another ruling of the Qur'ān (al-Nisā', 4:3) quoted earlier, which limits polygamy to four. The other qualification to the text under discussion is provided by the *mashhur* *ḥadīth* which forbids simultaneous marriage with the maternal and paternal aunt of

one's wife.¹³ This illustration also serves to show an instance of conflict between the *zāhir* and the *naṣṣ*. Since the second of the two *āyāt* under discussion is a *naṣṣ*, it is one degree stronger than the *zāhir* and would therefore prevail. This question of conflicts between the *zāhir* and *naṣṣ* will be further discussed later.

It will be noted that *naṣṣ*, in addition to its technical meaning which we shall presently elaborate, has a more general meaning which is commonly used by the *fuqahā'*. In the terminology of *fiqh*, *naṣṣ* means a definitive text or ruling of the Qur'ān or the *Sunnah*. Thus it is said that this or that ruling is a *naṣṣ*, which means that it is a definitive injunction of the Qur'ān or *Sunnah*. But *naṣṣ* as opposed to *zāhir* denotes a word or words that convey a clear meaning, and also represents the principal theme of the text in which it occurs. An example of *naṣṣ* in the Qur'ān is the Qur'ānic text on the priority of debts and bequests over inheritance in the administration of an estate. The relevant *āyah* assigns specific shares to a number of heirs and then states that the distribution of shares in all cases is to take place 'after the payment of legacies and debts' (al-Nisā', 4:11). Similarly, the Qur'ānic text which provides that 'unlawful to you are the dead carcass and blood' (al-Mā'idah, 5:3)

حرمت عليكم الميتة والدم

is a *naṣṣ* on the prohibition of these items for human consumption. As already stated, the *naṣṣ*, like the *zāhir*, is open to *ta'wīl* and abrogation. For example, the absolute terms of the *āyah* which we just quoted on the prohibition of dead carcasses and blood have been qualified elsewhere in the Qur'ān where 'blood' has been qualified as 'blood shed forth' (al-An'ām, 6:145). Similarly, there is a *ḥadīth* which permits consumption of two types of dead carcasses, namely fish and locusts.¹⁴ Another example of the *naṣṣ* which has been subjected to *ta'wīl* is the *ḥadīth* concerning the legal alms (*zakāh*) of livestock, which simply states that this shall be 'one in every forty sheep'.¹⁵

في أربعين شاة شاة.

The obvious *naṣṣ* of this *ḥadīth* admittedly requires that the animal itself should be given in *zakāh*. But it would seem in harmony with the basic purpose of the law to say that either the sheep or their equivalent monetary value may be given. The purpose of *zakāh* is to satisfy

the needs of the poor, and this could equally be done by giving them the equivalent amount of money; it is even likely that they might prefer this.¹⁶ The Hanafis have offered a similar interpretation for two other Qur'anic *āyāt*, one on the expiation of futile oaths, and the other on the expiation of deliberate breaking of the fast during Ramaḍān. The first is to feeding ten poor persons (al-Mā'idah, 5:92), and the second is to feed sixty such persons (al-Mujādilah, 58:4). The Hanafis have held that this text can be implemented either by feeding ten needy persons or by feeding one such person on ten occasions. Similarly, the provision in the second *āyah* may be understood, according to the Hanafis, to mean feeding sixty poor persons, or one such person sixty times.¹⁷

As already stated, *naṣṣ* is stronger than *ẓāhir*, and, should there be a conflict between them, the former prevails over the latter. This may be illustrated in the following two Qur'anic passages, one of which is a *naṣṣ* in regard to the prohibition of wine, and the other a *ẓāhir* in regard to the permissibility of eating and drinking in general. The two passages are as follows:

O believers! Intoxicants, games of chance and sacrificing to stone and arrows are the unclean works of Satan. So avoid them (al-Mā'idah, 5:90).

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ
رَجَسٌ مِنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ

On those who believe and do good deeds there is no blame for what they consume while they keep their duty and believe and do good deeds (al-Mā'idah, 5:93).

لَيْسَ عَلَى الَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ جُنَاحٌ فِيمَا
طَعَمُوا إِذَا مَا اتَّقَوْا وَآمَنُوا وَعَمِلُوا الصَّالِحَاتِ

The *naṣṣ* in the first *āyah* is the prohibition of wine, which is the main purpose and theme of the text. The *ẓāhir* in the second *āyah* is the permissibility of eating and drinking without restriction. The main purpose of the second *āyah* is, however, to accentuate the virtue of piety (*taqwā*) in that *taqwā* is not a question of austerity with regard to food, it is rather a matter of God-consciousness and good deeds. There is an apparent conflict between the two *āyāt* but, since the

prohibition of wine is established in the *naṣṣ*, and the permissibility regarding food and drink is in the form of *ẓāhir*, the *naṣṣ* prevails over the *ẓāhir*.¹⁸

To give an example of *ẓāhir* in modern criminal law, we may refer to the word 'night' which occurs in many statutes in connection with theft. When theft is committed at night, it carries a heavier penalty. Now if one takes the manifest meaning of 'night', then it means the period between sunset and sunrise. However, this meaning may not be totally harmonious with the purpose of the law. What is really meant by 'night' is the dark of the night, which is an accentuating circumstance in regard to theft. Here the meaning of the *ẓāhir* is qualified with reference to the rational purpose of the law and the nature of the offence in question.¹⁹

II.2 Unequivocal (*Mufassar*) and Perspicuous (*Muhkam*)

Mufassar or *mubayyan* is a word or a text whose meaning is completely clear and is, at the same time, in harmony with the context in which it appears. Because of this and the high level of clarity in the meaning of *mufassar*, there is no need for recourse to *ta'wīl*. But the *mufassar* may still be open to abrogation which might, in reference to the Qur'an and *Sunnah*, have taken place during the lifetime of the Prophet. The idea of the *mufassar*, as the word itself implies, is that the text explains itself. The Lawgiver has, in other words, explained His own intentions with complete clarity, and the occasion for *ta'wīl* does not arise. The *mufassar* occurs in two varieties, one being the text which is self-explained, or *mufassar biḥdānīh*; the other is when the ambiguity in one text is clarified and explained by another. This is known as *mufassar biḥayrīh*, in which case the two texts become an integral part of one another and the two combine to constitute a *mufassar*.²⁰ A text of the Qur'an may thus be explained by another text or by the *Sunnah* and the latter may be either verbal *Sunnah* or actual *Sunnah* consisting of practical illustration. Instances of conflict between the verbal and actual *Sunnah* are not expected to be frequent; should there be any such conflict, the verbal *Sunnah* takes priority over the actual, although there is an opinion that prefers the actual *Sunnah* to the verbal. However, the latter in time will be preferred in any case – in the event, that is, when the chronological order between them can be ascertained. An example of *mufassar* in the Qur'an is the text in sūrah al-Tawbah (9:36) which exhorts the believers to 'fight all the pagans as they fight you all'.

وَقَاتِلُوا الْمُشْرِكِينَ كَافَّةً كَمَا يُقَاتِلُوكُمْ كَافَةً

The word '*kāffah*', which occurs twice in this text, precludes the possibility of applying specification (*takhṣīs*) to the words preceding it, namely the pagans (*mushrikīn*). Another example of *mufassar* or *mubayyan biḥdāthih* is the text on the punishment of adultery, which reads: 'The adulterer, whether a woman or a man, flog each of them a hundred stripes' (al-Nūr, 24:2).

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

The text here is self-explanatory and specific regarding both the offence and the number of stripes by which it is punishable, and it is therefore in no need of *ta'wīl*. This form of *mufassar* occurs in many a modern statute with regard to specified crimes and their penalties, but also with regard to civil liabilities, the payment of damages, and debts. The words of the statute are often self-explained and definite so as to preclude *ta'wīl*. But the basic function of the explanation that the text itself provides is concerned with that part of the text which is ambivalent (*mujmal*) and needs to be clarified. When the necessary explanation is provided, the ambiguity is removed and the text becomes a *mufassar*. An example of this is the phrase '*laylah al-qadr*' ('night of *qadr*') in the following Qur'ānic passage. The phrase is ambiguous to begin with, but is then explained: 'We sent it [the Qur'ān] down on the Night of Qadr. What will make you realise what the Night of Qadr is like?...It is the night in which angels and the spirit descend' (al-Qadr, 97:1-4).

إِنَّا أَنْزَلْنَاهُ فِي لَيْلَةِ الْقَدْرِ وَمَا أَدْرَاكَ مَا لَيْلَةُ الْقَدْرِ لَيْلَةٌ

القدر خير من ألف شهر تنزل الملائكة والروح فيها

The text thus explains the '*laylah al-qadr*', and as a result of the explanation so provided, the text becomes self-explained, or *mufassar*. Hence there is no need for recourse to *ta'wīl*. Sometimes the ambiguous of the Qur'ān is clarified by the *Sunnah*, and when this is the case, the clarification given by the *Sunnah* becomes an integral part of the Qur'ān. There are numerous examples of this, such as the words *ṣalāh*, *zakāh*, *hajj*, *ribā*, which occur in the following *āyāt*:

Perform the *ṣalāh* and pay the *zakāh* (al-Baqarah, 2:43).

وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ

God has enjoined upon people the pilgrimage of *hajj*, to be performed by all who are capable of it (Āl 'Imrān, 3:97).

وَلِلَّهِ عَلَى النَّاسِ حِجُّ الْبَيْتِ مِنْ اسْتَطَاعَ إِلَيْهِ سَبِيلًا

God has permitted sale and prohibited usury (al-Baqarah, 2:275).

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

The juridical meanings of *ṣalāh*, *zakāh*, *hajj* and *ribā* could not be known from the brief references that are made to them in these *āyāt*. Hence the Prophet provided the necessary explanation in the form of both verbal and practical instructions. In this way the text that was initially ambivalent (*mujmal*) became *mufassar*. With regard to *ṣalāh*, for example, the Prophet instructed his followers to 'perform the *ṣalāh* the way you see me performing it'

صَلُّوا كَمَا رَأَيْتُمُونِي أَصْلِي.

and regarding the *hajj* he ordered them to 'take from me the rituals of the *hajj*'.²¹

خَلُّوا عَنِّي مَنَسُكَكُمْ.

There are also many *ḥadīth* which explain the Qur'ānic prohibition of *ribā* in specific and elaborate detail. In all of these cases, the Qur'ān has been explained and clarified by the *Sunnah*, which means that they are all examples of *mubayyan* or *mufassar biḥaythih*.

The value (*ḥukm*) of the *mufassar* is that acting upon it is obligatory. The clear meaning of a *mufassar* is not open to interpretation and unless it has been abrogated, and the obvious text must be followed. But since abrogation of the Qur'ān and *Sunnah* discontinued upon the demise of the Prophet, to all intents and purposes, the *mufassar* is equivalent to the perspicuous (*muhkam*), which is the last in the range of clear words and is not open to any change.

Specific words (*al-alfūz al-khāṣṣah*) which are not open to *ta'wīl* or any change in their primary meanings are in the nature of *mufassar*. Thus the Qur'ānic punishment of eighty lashes for slanderous accusation (*qadhif*) in *sūra al-Nūr* (24:4), or the *āyah* of inheritance (*al-Nisā'*, 4:11) which prescribes specific shares for legal heirs, consist of fixed numbers which rule out the possibility of *ta'wīl*. They all partake of the qualities of *mufassar*.²²

Since *mufassar* is one degree stronger than *naṣṣ*, in the event of a conflict between them, the *mufassar* prevails. This can be illustrated in the two *ḥadīth* concerning the ablution of a woman who experiences irregular menstruations that last longer than the expected three days or so: she is required to perform the *ṣalāh*; as for the ablution (*wuḍū'*) for *ṣalāh*, according to one *ḥadīth*, 'A woman in prolonged menstruations must make a fresh *wuḍū'* for every *ṣalāh*'.²³

المستحاضة تنوضاً لكل صلاة.

And according to another *ḥadīth*, 'A woman in prolonged menstruation must make a fresh *wuḍū'* at the time of every *ṣalāh*'.²⁴

المستحاضة تنوضاً وقت كل صلاة.

The first *ḥadīth* is a *naṣṣ* on the requirement of a fresh *wuḍū'* for every *ṣalāh*, but the second *ḥadīth* is a *mufassar* which does not admit *ta'wīl*. The first *ḥadīth* is not completely categorical as to whether 'every *ṣalāh*' applies to both obligatory and supererogatory (*ṣar'iq wa-naẓarīl*) types of *ṣalāh*. Supposing that they are both performed at the same time, would a separate *wuḍū'* be required for each? But this ambiguity does not arise under the second *ḥadīth* as the latter provides complete instruction: a *wuḍū'* is only required at the time of every *ṣalāh* and the same *wuḍū'* is sufficient for any number of *ṣalāh* at that particular time.²⁵

Words and sentences whose meaning is clear beyond doubt and are not open to *ta'wīl* and abrogation are called *muhkam*. An example of this is the frequently occurring Qur'ānic statement that 'God knows all things'. This kind of statement cannot be abrogated, either in the lifetime of the Prophet, or after his demise.²⁶ The text may sometimes explain itself in terms that would preclude the possibility of abrogation. An example of this is the Qur'ānic address to the believers concerning the wives of the Prophet: 'It is not right for you to annoy the Messenger of God; nor should you ever marry his widows after him. For that is truly an enormity in God's sight' (*al-Aḥzāb*, 33:53).

وما كان لكم أن تؤذوا رسول الله ولا أن تنكحوا أزواجه من بعده أبداً إن ذلكم كان عند الله عظيماً

The prohibition here is emphasised by the word *abadan* (never, ever) which renders it *muhkam*, thereby precluding the possibility of abrogation. The *muhkam* is, in reality, nothing other than *mufassar* with one difference, which is that *muhkam* is not open to abrogation. An example of *muhkam* in the *Sunnah* is the ruling concerning *jihād* which provides that '*jihād* remains valid till the day of resurrection'.²⁷

الجهاد ماض إلى يوم القيامة.

The '*ulamā'* of *uṣūl* have given the Qur'ānic *āyah* on slanderous accusation as another example of *muhkam*, despite some differences of interpretation that have arisen over it among the Hanafī and Shāfi'i jurists. The *āyah* provides, concerning persons who are convicted and punished for slanderous accusation (*qadhif*): 'And accept not their testimony ever, for such people are transgressors' (*al-Nūr*, 24:4).

ولا تقبلوا لهم شهادة أبداً وأولئك هم الفاسقون

Once again, the occurrence of *abadan* ('forever') in this text renders it *muhkam* and precludes all possibility of abrogation. The Hanafīs have held that the express terms of this *āyah* admit no exception. A *qādhif*, that is, a slanderous accuser, may never be admitted as a witness even if he repents. But according to the Shāfi'is, if the *qādhif* repents after punishment, he may be admitted as a witness. The reason for this exception, according to the Shāfi'is, is given in the subsequent portion of the same text, which reads: 'Unless they repent afterwards, and rectify themselves.' The grounds of these different interpretations need not be elaborated here. Suffice it to point out that the differences are over the understanding of the pronouns in the text, whether they refer both to the *qādhif* and transgressors, or to the latter only. There is no difference of opinion over the basic punishment of *qadhif*, which is eighty lashes as the text provides, but only with regard to the additional penalty disqualifying them as witnesses forever. It would thus appear that these differences fall within the scope of *tafsīr* rather than that of *ta'wīl*.

The *muhkam* is not open to abrogation. This may be indicated in

the text itself, as in the foregoing examples, or it may be due to the absence of an abrogating text. The former is known as *muhkam bi-dhātih*, or *muhkam* by itself, and the second as *muhkam bi-ghayrīh*, or *muhkam* because of another factor.²⁸

The purpose of the foregoing distinction between the four types of clear words is to identify their propensity or otherwise to *ta'wīl*, that is, of admitting a meaning other than their obvious meaning, and whether or not they are open to abrogation. If a word is not open to either of these possibilities, it would follow that it retains its original or primary meaning and admits no other interpretation. The present classification, in other words, defines the scope of *ta'wīl* in that the latter is applicable only to the *zāhir* and *nass* but not to the *mufassar* and *muhkam*. The next purpose of this classification is to provide guidelines for resolving possible conflicts between the various categories of words. In this way, an order of priority is established by which the *muhkam* prevails over the other three varieties of clear words and the *mufassar* takes priority over the *nass*, and so on. But this order of priority applies only when the two conflicting texts both occur in the Qur'ān. However, when a conflict arises between, say, the *zāhir* of the Qur'ān and the *nass* of the *Sunnah*, the former would prevail despite its being one degree weaker in the order of priority. This may be illustrated by the *āyah* of the Qur'ān concerning guardianship in marriage, which is of the nature of *zāhir*. The *āyah* provides: 'If he has divorced her, then she is not lawful to him until she marries [*hattā tankiḥa*] another man' (al-Baqarah, 2:230).

فإن طلقها فلا تحل له حتى تنكح زوجا غيره

This text is *zāhir* in respect of guardianship as its principal theme is divorce, not guardianship. From the Arabic form of the word '*tankiḥa*' in this text, the Hanafis have drawn the additional conclusion that an adult woman can contract her own marriage, without the presence of a guardian. However, there is a *ḥadīth* on the subject of guardianship which is in the nature of *nass*, which provides that 'there shall be no marriage without a guardian [*walī*]',²⁹

لا نكاح إلا بولي.

This *ḥadīth* is more specific on the point that a woman must be contracted in marriage by her guardian. Notwithstanding this, however, the *zāhir* of the Qur'ān is given priority, by the Hanafis at

least, over the *nass* of the *ḥadīth*. The majority of 'ulamā' have, however, followed the ruling of the *Sunnah* on this point.³⁰

II.3 The Obscure (*Khaṭf*)

Khaṭf denotes a word which has a basic meaning but is partially ambiguous in respect of some of the individual cases to which it is applied: the word is consequently obscure with regard to these cases only. The ambiguity in *khaṭf* needs to be clarified by extraneous evidence, which is often a matter of research and *ijtihād*. An example of *khaṭf* is the word 'thief' (*sāriq*), which has a basic meaning, but which, when it is applied to cases such as that of a pickpocket, or a person who steals the shrouds of the dead, does not make it immediately clear whether the punishment of theft can be applied to or not. The basic ingredients of theft are present in this activity, but the fact that the pickpocket uses a kind of skill in taking the assets of a person in wakefulness makes it somewhat different from theft. Similarly, it is not certain whether 'thief' includes a *nabbāsh*, that is, one who steals the shrouds of the dead, since a shroud is not a guarded property (*māl muḥraz*). Imam Shāfi'ī and Abū Yūsuf would apply the prescribed penalty of theft to the *nabbāsh*, whereas the majority of 'ulamā' only make him liable to the discretionary punishment of *ta'zīr*. There is also an *ijtihādī* opinion which authorises the application of the *ḥadd* of theft to the pickpocket.³¹

The word '*qātīl*' (killer) in the *ḥadīth* that 'the killer shall not inherit'³²

لا يرث القاتل.

is also *khaṭf* in respect of certain varieties of killing such as 'unintentional killing' (*gatal al-khaṭa'*). The Mālikis have held that erroneous killing is not included in the meaning of this *ḥadīth*, whereas according to the Hanafis, it is in the interest of safeguarding the lives of the people to include erroneous killing within the meaning of this *ḥadīth*.³³ To remove the ambiguity in *khaṭf* is usually a matter of *ijtihād*, which would explain why there are divergent rulings on each of the foregoing examples. It is the duty of the *mujtahid* to exert himself so as to clarify the ambiguity in the *khaṭf* before it can constitute the basis of a judicial order.

II.4 The Difficult (*Mushkil*)

Mushkil denotes a word which is inherently ambiguous, and whose ambiguity can only be removed by means of research and *ijtihad*. The *mushkil* differs from the *khafi* in that the latter has a basic meaning which is generally clear, whereas the *mushkil* is inherently ambiguous. There are, for example, words which have more than one meaning and, when they occur in a text, the text is unclear with regard to one or the other of those meanings. Thus the word *qur'* which occurs in *sūra al-Baqarah* (2:228) is *mushkil* as it has two distinct meanings: menstruation (*hayd*) and the clean period between two menstruations (*juhr*). Whichever of these is taken, the ruling of the text will differ accordingly. Imam Shāfi'ī and a number of other jurists have adopted the latter, whereas the Hanafis and others have adopted the former as the correct meaning of *qur'*.

Sometimes the difficulty arising in the text is caused by the existence of a conflicting text. Although each of the two texts may be fairly clear, as they stand alone, they become difficult when one attempts to reconcile them. This may be illustrated in the following two *āyāt*, one of which states: 'Whatever good that befalls you is from God, and whatever misfortune that happens to you, is from yourself' (*al-Nisā*, 4:79).

ما أصابك من حسنة فمن الله وما أصابك من سيئة فمن نفسك

Elsewhere we read in *sūra Āl 'Imrān* (3:154): 'Say that the matter is all in God's hands.'

قل إن الأمر كله لله

A similar difficulty is noted in the following two passages. According to the first, 'Verily God does not command obscurity' (*al-A'rāf*, 7:28).

قل إن الله لا يأمر بالفحشاء

And then we read in *sūra Banī Isrā'il* (17:16): 'When We decide to destroy a population, We first send a definite order to their privileged ones, and when they transgress, the word is proven against them. Then We destroy them with utter destruction.'

وإذا أردنا أن نهلك قرية أمرنا مترفيها ففسقوا فيها فحق عليها القول فدمرناها تدميرا

Could it be said that total destruction is a form of evil? There is no certainty as to the correct meaning of *mushkil*, as it is inherently ambiguous. Any explanation provided by the *mujtahid* is bound to be speculative. The *mujtahid* is nevertheless bound to exert himself in order to discover the correct meaning of *mushkil* before it can be implemented and adopted as a basis of action.¹⁴

II.5 The Ambivalent (*Mujmal*)

Mujmal denotes a word or text which is inherently unclear and gives no indication as to its precise meaning. The cause of ambiguity in *mujmal* is inherent in the locution itself. A word may be a homonym with more than one meaning, and there is no indication as to which might be the correct one, or alternatively the Lawgiver has given it a meaning other than its literal one, or the word may be totally unfamiliar. In each of these eventualities, there is no way of removing the ambiguity without recourse to the explanation that the Lawgiver has furnished Himself, for He introduced the ambiguous word in the first place. Words that have been used in a transferred sense, that is, for a meaning other than their literal one, in order to convey a technical or a juridical concept, fall into the category of *mujmal*. For example, expressions such as *ṣalāh*, *ribā'*, *hajj*, and *ṣiyām* have all lost their literal meanings due to the fact that the Lawgiver has used them for purposes other than those which they originally conveyed. Each of these words has a literal meaning, but since their technical meaning is so radically different from the literal, the link between them is lost and the technical meaning becomes totally dominant. A word of this type remains ambivalent until it is clarified by the Lawgiver Himself. The juridical meaning of all the Qur'ānic words cited above has been explained by the Prophet, in which case, they cease to be ambivalent. This is because when the Lawgiver provides the necessary explanation, the *mujmal* is explained and turns into *mufassar*. Ambiguity may also arise as a result of uncertainty in the correct meaning of the pronouns and adjectives. For instance, when a pronoun or adjective occurs in a sentence in such a way that it can refer to more than one subject, it renders the text a *mujmal* and cannot, therefore,

be enforced as law unless the necessary clarification is provided. Ambiguity may also arise due to uncertainty regarding the exact implication of particles. The *ḥadīth*, for example, that 'there is no *ṣalāh* without the *Fātiḥah*'

لا صلاة إلا بفاتحة الكتاب.

can mean that a *ṣalāh* is rendered null and void or that it is incomplete. The juridical value of the particle *lā* is thus unclear and the *ḥadīth* is therefore in need of clarification.

Ambiguity can also arise in acts as well as words, and we refer here particularly to the *Sunnah*, where we may have two versions of how the Prophet might have acted in a way that is not self-evident and requires clarification. The report, for example, that the Prophet combined (*jamā'a*) obligatory prayer while travelling is a *mujmal* in that it does not tell us the length of the journey and whether a short journey as well as a long one may qualify for the purposes of combining prayers. Hence the act remains ambiguous unless one finds additional information that might provide the necessary clarification.

Most of the examples given so far are of *mujmal* as singular words, but ambiguity may also arise in a context as a result of the combination of words. Note, for example, the Qur'ānic text referring to the dower in the event of a divorce, which states that it may be waived by one 'in whose hands is the marriage tie' (al-Baqarah, 2:237). The text can thus refer either to the spouse or to the guardian. Imam Shāfi'ī preferred the first meaning but Imam Mālik preferred the second. To give another example, we may refer to the *ḥadīth* which declares that 'acts are as good as the intentions behind them'.

إنما الأعمال بالنيات.

Al-Zarkashī has recorded different opinions on this *ḥadīth* to the effect that some have held it to be *mujmal*, yet there is some ambiguity as to the precise value that it may be said to convey. Does it mean, for example, that an act, say, of worship, without intent (*niyyah*) is invalid or merely imperfect? The '*ulamā*' seem to be divided over these two meanings.³⁵

The *mujmal* may sometimes be an unfamiliar word which is inherently vague, but is clarified by the text where it occurs. For example '*al-qān'ah*' and '*halā'*' which occur in the Qur'ānic passages as follows:

The stunning blow [*al-qān'ah*]. What is the stunning blow? What will make you realise what the stunning blow is? It is the Day on which the people will act like scattered moths; and the mountains will be like carded wool (al-Qān'ah, 101:1-5).

القارعة، ما القارعة، وما أدراك ما القارعة، يوم يكون الناس كالقاراش الميثوث، وتكون الجبال كالعهن المنفوش

Truly man was created restless [*halā'an*], so he panics whenever any evil touches him; and he withholds when some fortune befalls him (al-Ma'ārij, 70:19-21).

إن الإنسان خلق هلوعا إذا مسه الشر جزوعا وإذا مسه الخير منوعا

The ambivalent words in these passages have thus been explained and the text has, as a result, become self-explained, or *mufassar*. The *mujmal* turns into the *mufassar* only when the clarification that the Lawgiver provides is complete; but when it is incomplete, or insufficient to remove the ambiguity, the *mujmal* turns into a *mushkil*, which is then open to research and *ijtihād*. An example of this is the word *ribā* which occurs in the Qur'ān (al-Baqarah, 2:275) in the form of a *mujmal*, as when it reads: 'God permitted sale and prohibited *ribā*'.

وأحل الله البيع وحرم الربا

where the last word in this text literally meaning 'increase'. Since not every increase or profit is unlawful, the text remains ambivalent as to what type of increase it intends to forbid. The Prophet has clarified the basic concept of *ribā* in the *ḥadīth* which specifies six items (gold, silver, wheat, barley, salt and dates) to which the prohibition applies. But this explanation is insufficient in its detail in that it leaves room for reflection and enquiry as to the rationale of the text in respect of extending the same rule to similar commodities. The *ḥadīth* thus opens the way to further *ijtihād* and analogy with the goods it has specified.³⁶ With regard to the value (*hukm*) of the *mujmal*, the general rule is that it is one of suspension (*tawagguḥ*) until the ambiguity is removed. But there is an opinion that if ambiguity is due to a plurality of meanings,

and there is some indication or evidence in support of one, then it should be acted upon. If, for example, the social custom prefers one of the various meanings, then it should be upheld. Should there be no such evidence available, then the clarification must be attempted through *ijtihād*. If the various meanings of a *mujmal* are not incompatible, then any or all of them may be applied. The *āyah*, for example, which states that 'whoever is slain unjustly, we have indeed given authority to his heir' (al-Isrā', 17:33)

ومن قتل مظلوما فقد جعلنا لوليه سلطانا

is ambiguous as to the meaning of 'authority', whether it means retaliation, blood-money or power; it may mean all of these. Imam Shāfi'i has held it to be a reference to retaliation.

The view has prevailed among the 'ulamā' that there is no *mujmal* left unclarified in the Qur'ān following the demise of the Prophet. Al-Juwaynī stated the best view on this point, which is that no *mujmal* is left unclarified in the area of decisive injunctions, the *ahkām*. It is possible, according to this view, that *mujmal* may have remained unclarified outside the sphere of the *ahkām*.³⁷

II.6 The Intricate (*Mutashābih*)

This denotes a word whose meaning is a total mystery. There are words in the Qur'ān whose meaning is not known at all. Neither the words themselves nor the text in which they occur provide any indication as to their meaning. The *mutashābih* as such does not occur in the legal *nuṣūṣ*, but it does occur in other contexts. Some of the sūras of the Qur'ān begin with what is called the *muqatta'āt*, that is, abbreviated letters whose meaning is a total mystery. Expressions such as *alif-lām-mīm*, *yā-sīn*, *bā-mīm* and many others which occur on twenty-nine occasions in the Qur'ān, are all classified as *mutashābih*. Some 'ulamā' have held the view that the *muqatta'āt* are meant to exemplify the inimitable qualities of the Qur'ān, while others maintain that they are not abbreviations but symbols and names of God; that they have numerical significance; and that they are used to attract the attention of the audience. According to yet another view, the *mutashābih* in the Qur'ān is meant as a reminder of limitations in the knowledge of the believer, who is made to realise that the unseen realities are too vast to be comprehended by reason.³⁸ There is also a view that the abbreviated letters are names of the chapters of the Qur'ān, and,

according to another view, these are the secret messages that were meant only for the Prophet Muḥammad.

Some 'ulamā', including Ibn Hazm al-Zāhiri, have held the view that, with the exception of the *muqatta'āt*, there is no *mutashābih* in the Qur'ān. Others have maintained that the passages of the Qur'ān which draw resemblances between God and man are also in the nature of *mutashābih*.³⁹ Thus the *āyāt* which states that 'the hand of God is over their hands' (al-Fath, 48:10)

يد الله فوق أيديهم

and the reference to the Prophet Noah where we read: 'Build a ship under Our eyes and Our inspiration' (Hūd, 11:37)

واصنع الفلك بأعيننا ووحينا

and in sūra al-Rahmān (55:27) where the text runs 'and the face of your Lord will abide forever'

ويبقى وجه ربك

are instances of *mutashābih* as their precise meaning cannot be known. Other words and phrases such as *al-nūh* (soul), *maker Allāh* (God's trick) and *al-istiwā'* 'ala'l-'arsh (God's seating on the throne) have also been identified as *mutashābih*. One can of course draw an appropriate metaphorical meaning in each case, which is what the Mu'tazilāh have attempted, but this is neither satisfactory nor certain. To say that 'hand' metaphorically means power, and 'eyes' means supervision is no more than a conjecture, for we do not know the subject of our comparison. The Qur'ān also tells us that 'there is nothing like Him' (al-Shūrā, 42:11).

ليس كمثله شيء

Since the Lawgiver has not explained these similitudes to us, they remain unintelligible.⁴⁰ The existence of the *mutashābih* in the Qur'ān is proven by the testimony of the Qur'ān itself, which is as follows:

He it is who has sent down to you the Book. Some of it consist of *muḥkamāt*, while others are *mutashābihāt*. Those who have perversity in their hearts, in their quest for sedition, follow the *mutashābihāt* and search for its hidden meanings. But no one knows those meanings, except God and those who are firmly grounded in knowledge. (Al 'Imrān, 3:7)

هو الذي أنزل عليك الكتاب منه آيات محكمات هن أم
الكتاب وأخر متشابهات فأما الذين في قلوبهم زيغ فيتبعون
ما تشابه منه ابتغاء الفتنة وابتغاء تأويله وما يعلم تأويله
إلا الله والراسخون في العلم

The 'ulamā' have differed in their understanding of this *āyah*, particularly with regard to the definition of *muhkamāt* and *mutashābihāt*. But the correct view is that *muhkam* is that part of the Qur'ān which is not open to conjecture and doubt, whereas the *mutashābih* is. With regard to the letters which appear at the beginning of sūras, it has been suggested that they are the names of the sūras in which they occur. As for the question of whether acting upon the *mutashābih* is permissible or not, there is disagreement, but the correct view is that no one may act upon it. This is so, not because the *mutashābih* has no meaning, but because the correct meaning is not known to any human being.⁴¹ There is no doubt that all the *mutashābihāt* have a meaning, but it is only known to God, and we must not impose our estimations on the words of God in areas where no indication is available to reveal the correct meaning to us.⁴²

III. Classification (B): The 'Āmm (General) and the Khāṣṣ (Specific).

From the viewpoint of scope, words are classified into the 'general' and the 'specific'. This is basically a conceptual distinction that is not always obvious in the grammatical forms of words, although the 'ulamā' have identified certain linguistic patterns of words which assist us in differentiating the 'āmm from the khāṣṣ.

'Āmm may be defined as a word which applies to many things, not limited in number, and includes everything to which it is applicable.⁴³ An example of this is the word 'insān' (human being) in the Qur'ānic *āyah*, 'verily the human being is in loss' (al-'Asr, 103:1)

إن الإنسان لفي خسر

or the command, 'whoever enters this house, give him a dirham'. In

both examples the application of 'human being' and 'whoever' is general and includes every human being without any limitation. 'Āmm is basically a word that has a single meaning, but applies to an unlimited number without any restrictions. The word is thus not confined in its application, even if in reality it applies only to a limited number, such as the words skies, sky-scrapers and spaceships, of which there may only be a limited number in existence. All words, whether in Arabic or any other language, are basically general, and, unless they are specified or qualified in some way, they retain their generality. According to the reported *ijmā'* of the Companions and the accepted norms of Arabic, the words of the Qur'ān and *Sumnah* apply in their general capacity unless there is evidence to warrant a departure from the general to an alternative meaning.⁴⁴ To say that the 'āmm has a single meaning differentiates the 'āmm from the homonym (*mushtarak*) which has more than one meaning. Similarly, the statement that the 'āmm applies to an unlimited number precludes the *khāṣṣ* from the definition of 'āmm.⁴⁵ A word may be general either by its form, such as men, students, judges, etc., or by its meaning only, such as people, community, etc., or by way of substitution, such as by prefixing pronouns like all, every, entire, etc., to common nouns. Thus the Qur'ānic *āyah* which provides that 'every soul shall taste of death' (Al 'Imrān, 3:185),

كل نفس ذائقة الموت

or the statement that 'every contract consists of two parties' are both general in their import.

The 'āmm must include everything to which it is applicable. Thus when a command is issued in the form of an 'āmm, it is essential that it is implemented as such. In this way, if A commands his servant to give a dirham to everyone who enters his house, the proper fulfilment of this command would require that the servant does not specify the purport of A's command to, say, A's relatives only. If the servant gives a dirham only to A's relatives with the explanation that he understood that this was what A had wanted, the explanation would be unacceptable and the servant would be at fault.

When a word is applied to a limited number of things, including everything to which it can be applied, say one or two or a hundred, it is referred to as 'specific' (*khāṣṣ*). A word of this kind may denote a particular individual such as Ahmad, or Zayd, or an individual belonging to a certain species such as a horse or a bird, or an individual

belonging to a genus such as a human being.⁴⁶ As opposed to the general, the specific word applies to a limited number, be it a genus, or a species, or a particular individual. So long as it applies to a single subject, or a specified number thereof, it is *khāṣṣ*. But if there is no such limitation in the scope of its application, it is classified as *‘āmm*.

Legal rules that are conveyed in specific terms are definite in application and are normally not open to *ta’wīl*. Thus the Qur’ānic *āyah* which enacts the ‘feeding of ten poor persons’ as the expiation for futile oaths is specific and definite in that the number ‘ten’ does not admit of any *ta’wīl*. However, if there are exceptional reasons to warrant a recourse to *ta’wīl*, then the *khāṣṣ* may be open to it. For example, the requirement to feed ten poor persons in the foregoing *āyah* has been interpreted by the Hanafīs as either feeding ten persons or one such person ten times. The Hanafīs have, however, been overruled by the majority on this point who say that the *khāṣṣ*, as a rule, is not amenable to *ta’wīl*.

In determining the scope of the *‘āmm*, reference is made not only to the rules of the language but also to the usage of the people, and should there be a conflict between the two, priority is given to the latter. The Arabs normally use words in their general sense. But this statement must be qualified by saying that linguistic usage has many facets. Words are sometimes used in the form of *‘āmm* but the purpose of the speaker may actually be less than *‘āmm* or even *khāṣṣ*. The precise scope of the *‘āmm* has thus to be determined with reference to the conditions of the speaker and the context of the speech. When, for example, a person says ‘I honoured the people’ or ‘I fought the enemy forces’, he must surely mean only those whom he met. *‘Āmm* as a rule applies to all that it includes, especially when it is used on its own. But when it is used in combination with other words, then there are two possibilities: either the *‘āmm* remains as before, or it is specified by other words.⁴⁷

It thus appears that there are three types of *‘āmm*, which are as follows. Firstly, the *‘āmm* that is absolutely general, which may be indicated by a prefix in the form of a pronoun. Note for example the Qur’ānic *āyah*, ‘There is no living creature on earth [*wa mā min dābbatin fi’l-ard*] that God does not provide for’ (Hūd, 11:6)

وما من دابة في الأرض إلا على الله رزقها

and ‘We made everything alive from water’ (al-Anbiyā’, 21:30).

وجعلنا من الماء كل شيء حي

In the first *āyah*, the prefix ‘*mā min*’ (‘no one’, ‘no living creature’), and in the second *āyah*, the word ‘*kull*’ (i.e. ‘all’ or ‘every’) are expressions which identify the *‘āmm*. Both *āyāt* consist of general propositions which preclude specification of any kind. Hence they remain absolutely general and include all to which they apply without any exception. Secondly, there is the *‘āmm* which is meant to imply a *khāṣṣ*. This usage of *‘āmm* is also indicated by evidence which suggests that the *‘āmm* comprises some but not absolutely all the individuals to whom it could possibly apply. An example of this is the word *al-nās* (the people) in the Qur’ānic *āyah*, ‘Pilgrimage to the House is a duty owed to God by all people who are able to undertake it’ (Āl ‘Imrān, 3:97).

والله على الناس حج البيت من استطاع إليه سبيلا.

Here the indications provided by the text imply that children and lunatics or anyone who cannot afford to perform the required duty are not included in the scope of this *āyah*. Thirdly, there is the *‘āmm* that is not accompanied by either of the foregoing two varieties of indications as to its scope. An example of this is the Qur’ānic word *al-muṭallaqāt* (divorced women) in the text which states that ‘divorced women must observe three [monthly] courses upon themselves’ (al-Baqarah, 2:228).

والملقات يتربصن بأنفسهن ثلاثة قروء

This type of *‘āmm* is *ẓāhir* in respect of its generality, which means that it remains general unless there is evidence to justify specification (*takhṣīs*). In this instance, however, there is another Qur’ānic ruling which qualifies the general requirement of the waiting period, or *‘iddah*, that the divorced women must observe. This ruling occurs in *sūra al-Aḥzāb* (33:49) which is as follows: ‘O believers! When you enter the contract of marriage with believing women and then divorce them before consummating the marriage, they do not have to observe any *‘iddah*’.

يا أيها الذين آمنوا إذا نكحتم المؤمنات ثم طلقتموهن

من قبل أن تمسوهن فما لكم عليهن من عدة

In this way, women who are divorced prior to consummating the marriage are excluded from the general requirement of the first *āyah*. The second *āyah*, in other words, specifies the first.⁴⁸

The general of the Qur'ān may be specified by the Qur'ān itself and also by the *Sunnah*. The general of the *Sunnah* may likewise be specified by the *Sunnah* itself and also by the Qur'ān, although there is some difference of opinion on this last point in that specification of the general is a form of explanation (*bayān*), and this is the proper role of the *Sunnah* in its relationship to the Qur'ān, but not vice versa. The majority of the 'ulamā' are also in agreement that the general rulings of both the Qur'ān and the *Sunnah* may be specified by consensus (*ijmā'*) and even, according to some, by *qiyās*.

We have already given an example of when the Qur'ān specifies its own general ruling on the waiting period of divorced women. For a similar example, we may refer to the general ruling of the text on fasting which makes fasting obligatory: 'Whoever of you is present in the month shall fast therein.' This is then immediately specified in: 'Whoever is sick or in journey shall fast a like number of other days.' (al-Baqarah, 2:185).

فمن شهد منكم الشهر فليصمه ومن كان مريضاً أو على سفر
فعدة من أيام أخر.

The sick and the traveller have thus been exempted, by way of *takhṣiṣ*, from the original ruling of the text.

To illustrate the specification of the general rulings of the Qur'ān by *mutawātir ḥadīth*, we refer to the *ḥadīth* which declares that 'the Muslim does not inherit from the disbeliever, nor does the disbeliever inherit from the Muslim'.

لا يرث المسلم الكافر ولا الكافر المسلم.

This *ḥadīth* acts as a specifier of the Qur'ānic *āyah* of inheritance (i.e. al-Nisā, 4:12-13). This is an example of the verbal *Sunnah*. For an example of the actual *Sunnah* that specifies a general ruling of the Qur'ān, reference may be made to the *āyah* on the punishment of adultery in sūra al-Nūr (24:2), which the 'ulamā' held to have been specified by the actual *Sunnah* that enacted death by stoning for adultery by a married Muslim (i.e. a *muḥṣan*). However, there is some doubt in establishing the chronological order of these two rulings. If

it is established that the ruling in sūra al-Nūr was revealed after the punishment of stoning, then it may be in order to say that the Qur'ān actually abrogated the practical *Sunnah* and enacted a general punishment of one hundred lashes for all cases of *zinā*. Al-Bukhārī recorded a *ḥadīth* in which a prominent Companion, 'Abd Allāh ibn Awfā, was asked the question as to whether the ruling in sūra al-Nūr came before or after the punishment of death by stoning, and he answered that he did not know. This kind of doubt might well amount to the sort of doubt which invalidates the *ḥadd* punishment, as it is known, of death by stoning for *zinā*, in which case the nature of the relationship between the rulings of the Qur'ān and *Sunnah* on this issue would be one of abrogation rather than *takhṣiṣ*.⁴⁹

The majority of 'ulamā' are in agreement that *ijmā'* may specify a general ruling of the Qur'ān. An example of this is the text on the Friday congregational prayer which is addressed to all believers asking them to attend the congregation after the prayer call (i.e. the *adhān*) (al-Jum'ah, 62:10). The *ijmā'* has, on the other hand, specified the general purpose of this ruling in respect of women and slaves (when there were slaves, that is) who are exempt from attending the Friday prayer.

One can also find many example where the *āḥad ḥadīth* have specified the general rulings of the Qur'ān. The *āyah* of inheritance in sūra al-Nisā (4:12), which determined a share for the daughter, has thus been specified by the *ḥadīth* 'We the community of the Prophets are not inherited.'

إنا معشر الأنبياء لا نورث.

The Prophet's daughter, Fāṭima, was consequently not entitled to inheritance from her father. Similarly, the general ruling of the Qur'ān concerning marriage that declared, immediately after stating the prohibited degrees of relations – 'and lawful for you are [all women] other than those' (al-Nisā, 4:24) – has in turn been specified by the *āḥad ḥadīth* which forbids simultaneous marriage with the maternal and paternal aunts of one's wife:

لا تنكح المرأة على عمتها ولا على خالتها.

As to the question of whether *qiyās* can also act as a specifier of the general rulings of the Qur'ān and *Sunnah*, al-Zarkashī stated that the four leading imams are in agreement that this is permissible, although different opinions have been recorded on the issue and some of them

are negative. For an example of *qiyās* which has specified the text, we refer to the *āyah* which decreed that after two pronouncements of *ṭalāq*, the husband must either 'retain them with kindness or release them with kindness, and call to witness two just ones from among you' (al-Talāq, 65:2).

فأمسكوهن بمعروف أو فارقوهن بمعروف وأشهدوا ذوي عدل
منكم

It is likely that the command concerning witnesses in this *āyah* conveys an obligation such as we read in the *ḥadīth* 'There is no marriage without the guardian and two just witnesses.'

لا نكاح الا بولي وشاهدي عدل.

It is also possible that the command conveys a recommendation (*nadb*) only, such as we find concerning sale in the Qur'ān, 'and have witnesses when you sell to one another.' (al-Baqarah, 2:282).

وأشهدوا إذا تباعتم

Imam Shāfi'ī said that God, Most High, has drawn a parallel between *ṭalāq* and revocation (*raṣ'ah*) and commanded testimony in both. Since we know that testimony is not obligatory in *ṭalāq*, it is not obligatory, by way of analogy, in *raṣ'ah* either. The general ruling of the text which conveyed *wujūb* has thus been specified by way of analogy into a recommendation only.⁵⁹ The basic and general meaning of a command, which is *wujūb*, has thus been specified into *nadb* on the grounds of analogical reasoning.

In grammatical terms, the *āmm* in its Arabic usage takes a variety of identifiable forms. The grammatical forms in which the *āmm* occurs are, however, numerous and, owing to the dominantly linguistic and Arabic nature of this subject, I shall only attempt to explain some of the well-known patterns of the *āmm*.

When a singular or a plural form of a noun is preceded by the definite article *al*, it is identified as *āmm*. For example, the Qur'ānic text which provides, 'the adulterer, whether a woman or a man, flog them one hundred lashes' (al-Nūr, 24:2).

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

Here the article *al* preceding 'adulterer' (*al-zāniyah wa'l-zānī*) indicates that all adulterers must suffer the prescribed punishment. Similarly, when the plural form of a noun is preceded by *al*, it is identified as *āmm*. The example that we gave above relating to the waiting period of the divorced women (*al-muṭallaqāt*) is a case in point. The *āyah* in question begins by the word '*al-muṭallaqāt*', that is, 'the divorced women'⁶⁰ who are required to observe a waiting period of three courses before they can marry again. 'The divorced women' is an *āmm* which includes all to whom this expression can apply.

The Arabic expressions *jamī'*, *kāffah* and *kull* ('all', 'entire'), are generic in their effect and, when they precede or succeed a word, the latter comprises all to which it is applicable. We have already illustrated the occurrence of '*kull*' in the Qur'ānic text where we read 'We made everything [*kulla shay'in*] alive from water'. The word *jamī'* has a similar effect when it precedes or follows another word. Thus the Qur'ānic text which reads, 'He has created for you all that is in the earth' (al-Baqarah, 2:29)

هو الذي خلق لكم ما في الأرض جميعا

means that everything in the earth is created for the benefit of man. Similarly, when a word, usually a plural noun, is prefixed by a conjunctive such as *walladhīna* ('those men who') and *wallātī* ('those women who'), it becomes generic in its effect. An example of this in the Qur'ān occurs in sūra al-Nūr (24:4): 'Those who accuse chaste women of adultery and fail to bring four witnesses, flog them eighty lashes.'

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم

ثمانين جلدة

This ruling is general as it applies to all those who can possibly be included in its scope, and it remains so unless there is evidence to warrant specification. As it happens, this ruling has, in so far as it relates to the proof of slanderous accusation, been specified by a subsequent *āyah* in the same passage. This second *āyah* makes an exception in the case of the husband who is allowed to prove a charge of adultery against his wife by taking four solemn oaths instead of four witnesses, but the wife can rebut the charge by taking four solemn oaths herself (al-Nūr, 24:6). The general ruling of the first *āyah* has thus been qualified insofar as it concerns a married couple.

An indefinite word (*al-nakirah*) when used to convey the negative is also generic in its effect. For instance, the *ḥadīth lā ḍarar wa lā ḍirār fī'l-Islām* ('no harm shall be inflicted or reciprocated in Islam') is general in its import, as 'lā ḍarar' and 'lā ḍirār' are both indefinite words which convey their concepts in the negative, thereby negating all to which they apply.

The word 'man' ('he who') is specific in its application, but when used in a conditional speech, it has the effect of a general word. To illustrate this in the Qur'ān, we may refer to the text which provides: 'Whoever kills a believer in error, must release a believing slave' (*al-Nisā'*, 4:92);

ومن قتل مؤمنا خطأ فتحرير رقبة مؤمنة

and 'Whoever among you sees the new moon must observe the fast' (*al-Baqarah*, 2:185).

فمن شهد منكم الشهر فليصمه

There is general agreement that the *khāṣṣ* is definitive (*qaṭ'i*) in its import, but the 'ulamā' have differed as to whether the 'āmm is definitive or speculative (*ẓannī*). According to the Hanafis, the application of 'āmm to all that it includes is definitive, the reason being that the language of the law is usually general and if its application were to be confined to only a few of the cases covered by its words without a particular reason or authority to warrant such limited application, the intention of the Lawgiver would be frustrated.⁵² The majority of 'ulamā', including the Shāfi'is, Mālikis and Ḥanbalis maintain, on the other hand, that the application of 'āmm to all that it includes is speculative as it is open to limitation and *ta'wīl*, and so long as there is such a possibility, it is not definitive. The result of this disagreement becomes obvious in the event of a conflict between the 'āmm of the Qur'ān and the *khāṣṣ* of the *ḥadīth*, especially the weak or the solitary *ḥadīth*. According to the majority view, a solitary *ḥadīth* may specify a general provision of the Qur'ān, for the 'āmm of Qur'ān is *ẓannī* and the *khāṣṣ* of a solitary *ḥadīth*, although definitive in meaning, is of speculative authenticity. A *ẓannī* may be specified by a *qaṭ'i* or another *ẓannī*.⁵³ To the Hanafis, however, the 'āmm of Qur'ān is definite, and the solitary *ḥadīth*, or *qiyās* for that matter, is speculative. A definitive may not be limited nor specified by a speculative. The two views may be illustrated with reference to the Qur'ānic text

concerning the slaughter of animals, which provides 'eat not [of meat] on which God's name has not been pronounced' (*al-An'ām*, 6:121).

ولا تأكلوا ما لم يذكر اسم الله عليه

In conjunction with this general ruling, there is a solitary *ḥadīth* which states that 'the believer slaughters in the name of God whether he pronounces the name of God or not'.⁵⁴

ذبيحة المسلم حلال ، ذكر اسم الله أو لم يذكر .

Elsewhere the Qur'ān addresses the believers, with reference to the *Ahl al-Kitāb*, that their 'food is lawful for you and your food is lawful for them' (*al-Mā'idah*, 5:5).

وطعام الذين أوتوا الكتاب حل لكم وطعامكم حل لهم

The word 'food' in this *āyah* means animals that are slaughtered by the Jews and the Christians. This is lawful for Muslims only when it is slaughtered in the name of God. Then we read in the *ḥadīth* the specifying terms, which exempt only the Muslims from the requirement of the *āyah* in *sūra al-An'ām*. The prohibitory terms of this *āyah* thus remain in force with regard to animals slaughtered by the *Ahl al-Kitāb*, whereas the *ḥadīth* before us has relaxed the terms of that requirement with regard to Muslims.

According to the majority, this *ḥadīth* specifies the Qur'ānic *āyah*, with the result that slaughter by a Muslim, even without pronouncing the name of God, is lawful for consumption. But to the Hanafis, it is not lawful, as the 'āmm of the Qur'ān may not be specified by solitary (*āḥad*) *ḥadīth*. This disagreement between the juristic schools, however, arises in respect of the solitary *ḥadīth* only. As for the *mutawātir* (and the *mashhūr*) there is no disagreement on the point that either of these may specify the general in the Qur'ān just as the Qur'ān itself sometimes specifies its own general provisions.⁵⁵

A general proposition may be qualified either by a dependent clause, that is, a clause that occurs in the same text, or by an independent locution. The majority of 'ulamā' consider either of these eventualities to be two varieties of *takḥīṣ*. According to the Hanafis, however, an independent locution can specify another locution only if it is established that the two locutions are chronologically parallel to one

another, but if they are not so parallel, the latter in time abrogates the former, and the case is one of abrogation rather than *takhṣīs*. In the event where the qualifying words relate to what has preceded and do not form a complete locution by themselves, they are not regarded as independent propositions. According to the scholarly majority, but not the Hanafis, a dependent clause may qualify a general proposition by introducing an exception (*istithnā'*), a condition (*shart*), a quality (*ṣifah*), or indicating the extent (*ghāyah*) of the original proposition. Each such clause will have the effect of limiting and specifying the operation of the general proposition. An example of specification in the form of *istithnā'* is the general ruling that prescribes the documentation of commercial transactions that involve deferred payments in *sūra* al-Baqarah (2:282).

إلا أن تكون تجارة حاضرة تديرونها بينكم فليس عليكم جناح
ألا تكتبوها

This general provision is then followed, in the same *āyah*, by the exception 'unless it be a transaction handled on the spot that you pass around among yourselves, in which case it will not be held against you if you did not reduce it into writing'. This second portion of the *āyah* thus embodies an exception to the first. Specification (*takhṣīs*) in the form of a condition (*shart*) to a general proposition may be illustrated by reference to the Qur'anic text which prescribes the share of the husband in the estate of his deceased wife. The text states: 'In what your wives leave, you are entitled to one half if they have no children' (al-Nisa', 4:12).

ولكم نصف ما ترك أزواجكم إن لم يكن لهن ولد

The application of the general rule in the first portion of the *āyah* has thus been qualified by the condition the text itself has provided in its latter part, namely the absence of children. And then to illustrate *takhṣīs* by way of providing a description or qualification (*ṣifah*) to a general proposition, we may refer to the Qur'anic text regarding the prohibition of marriage with one's step-daughter where we read '[and forbidden to you are] your step-daughters under your guardianship from your wives with whom you have consummated the marriage' (al-Nisa', 4:23).

وربائبكم اللاتي في حجوركم من نسائكم اللاتي دخلتم بهن

Thus the general prohibition in the first part of the *āyah* has been qualified by the description that is provided in the latter part. To illustrate *takhṣīs* in the form of *ghāyah*, or specifying the extent of application of a general proposition, we may refer to the Qur'anic text on ablutions for *ṣalāh*. The text prescribes the 'washing of your faces and your hands up to the elbows' (al-Ma'idah, 5:6).

فاغسلوا وجوهكم وأيديكم إلى المرافق

Washing the hands, which is a general ruling, is thus specified in regard to the area that must be covered in washing. Similarly, when it is said 'respect your fellow citizens unless they violate the law', the word 'citizens' includes all, but the succeeding phrase specifies the extent of the operation of the general ruling.³⁶

When the application of a general proposition is narrowed down, not by a clause that is part of the general locution itself, but by an independent locution, the latter may consist of a separate text, or of a reference to the general requirements of reason, social custom, or the objectives of *Sharī'ah* (*hikmah al-tashrī'*). It is by virtue of reason, for example, that infants and lunatics are excluded from the scope of the Qur'anic obligation of *hajj*, which occurs in *sūra* Al 'Imrān (3:97). Similarly, the general text of the Qur'an which reads that '[a wind] will destroy everything by the command of its Lord' (al-Ahqāf, 46:25)

تدمر كل شيء بأمر ربها

customarily denotes everything that is capable of destruction. Similarly, in the area of commercial transactions, the general provisions of the law are often qualified in the light of prevalent custom.

And lastly, the general provision of the Qur'an concerning retaliation in injuries on an 'equal for equal' basis (al-Ma'idah, 5:48) is qualified in the light of the objectives of the Lawgiver in the sense that the offender is not to be physically wounded in the manner that he injured his victim, but is to be punished in proportion to the gravity of his offence.³⁷

Then there arises the question of chronological order between the general and the specifying provisions. The specifying clause is either parallel in origin to the general, or is of later origin, or their

chronological order is unknown. According to the Hanafis, when the specifying clause is of a later origin than the general proposition, the former abrogates the latter and is no longer regarded as *takhṣīs*, but as a partial abrogation of one text by another. According to the Hanafis, *takhṣīs* can only take place when the 'āmm and the *khāṣṣ* are chronologically parallel to one another; in cases where this order cannot be established between them, they are presumed to be parallel. The difference between abrogation and *takhṣīs* is that abrogation consists of a total or partial suspension of a ruling at a later date, whereas *takhṣīs* essentially limits the application of the 'āmm *ab initio*. To the majority of 'ulamā', *takhṣīs* is a form of explanation (*bayān*) in all of its varieties, but to the Hanafis it is a form of *bayān* only when the specifying clause is independent of the general proposition, chronologically parallel to it, and is of the same degree of strength as the 'āmm in respect of being a *qaf'i* or a *ẓannī*. But when the specifying clause is of a later origin than the general proposition, the effect it has on the latter, according to the Hanafis, is one of abrogation rather than *bayān*.⁵⁸ The majority view on *takhṣīs* thus differs from the Hanafis in that *takhṣīs* according to the majority may be by means of both a dependent or an independent locution, and the specifying clause need not be chronologically parallel to the general proposition. This is because, in the majority opinion, the specifying clause explains and does not abrogate nor invalidate the general proposition.⁵⁹

Notwithstanding the disagreement of the 'ulamā' regarding the nature of *takhṣīs*, it would appear that *takhṣīs* is not a partial invalidation of the 'āmm, but an explanation or qualification of it. This is the majority view, and seems to be preferable to the Hanafī view that equates *takhṣīs* with partial abrogation.⁶⁰ Al-Ghazālī discusses the Hanafī position at some length, and refutes it by saying that a mere discrepancy in time does not justify the conclusion that *takhṣīs* changes its character into abrogation. Nor is it justified to say that a discrepancy in the strength of the indication (*dalīl*) determines the difference between *takhṣīs* and abrogation.⁶¹

The effect of 'āmm is that it remains in force, and action upon it is required, unless there is a specifying clause that limits its application. In the event where a general provision is partially specified, it still retains its legal authority in respect of the part that remains unspecified. According to the majority of 'ulamā', the 'āmm is speculative as a whole, whether before or after *takhṣīs*, and as such it is open to qualification and *ta'wīl* in either case. For the Hanafis, however, the 'āmm is definitive in the first place, but when it is

partially specified, it becomes speculative in respect of the part which still remains unspecified; hence it will be treated as *ẓannī* and would be susceptible to further specification by another *ẓannī*.⁶²

As for the question of whether the cause of a general ruling can operate as a limiting factor in its general application, it will be noted that the cause never specifies a general ruling. This is relevant, as far as the Qur'ān is concerned, to the question of *asbāb al-nuzūl*, or the occasions of its revelation. One often finds general rulings in the Qur'ān which were revealed with reference to specific issues. Whether the cause of the revelation referred to a particular situation or not, it does not operate as a limiting factor on the application of the general ruling. Thus the occasion of the revelation of the *āyah* of imprecation (*li'ān*) in sūra al-Nūr (24:6) was a complaint that a resident of Medina, Hilāl ibn Umayyah, made to the Prophet about the difficulty experienced by the spouse in proving, by four eyewitnesses, the act of adultery on the part of the other spouse. The cause of the revelation was specific but the ruling remains general. Similarly, the *ḥadīth* which states that 'when any hide is tanned, it is purified'⁶³

أَيُّمَا أَهَابَ دَبِغٌ فَقَدْ طَهَرَ.

was, according to reports, uttered with reference to a sheepskin, but the ruling is nevertheless applicable to all types of skins. The actual wording of a general ruling is therefore to be taken into consideration regardless of its cause. If the ruling is conveyed in general terms, it must be applied as such, even if the cause behind it happens to be specific.⁶⁴

III.1 Conflicts between 'Āmm and Khāṣṣ

Should there be two textual rulings on one and the same subject in the Qur'ān, one being 'āmm and the other *khāṣṣ*, there will be a case of conflict between them according to the Hanafis, but not according to the majority. The reason is that to the Hanafis, 'āmm and *khāṣṣ* are both definitive (*qaf'i*) and as such a conflict between them is possible, whereas to the majority, only the *khāṣṣ* is *qaf'i* and it will always prevail over the 'āmm, which is *ẓannī*.

The Hanafis maintain that in the event of a conflict between the general and the specific in the Qur'ān, one must ascertain the chronological order between them first; whether, for example, they are both Meccan or Medinan *āyāt* or whether one is Meccan and the other

Medinan. If the two happen to be parallel in time, the *khāṣṣ* specifies the 'āmm. If a different chronological sequence can be established between them, then if the 'āmm is of a later origin, it abrogates the *khāṣṣ*, but if the *khāṣṣ* is later, it only partially abrogates the 'āmm. This is because the Hanafis maintain that the *khāṣṣ* specifies the 'āmm only when they are chronologically parallel, both are *qaf'i*, and both are independent locutions.

The majority of 'ulamā', as already noted, do not envisage the possibility of a conflict between the 'āmm and the *khāṣṣ*: when there are two rulings on the same point, one being 'āmm and the other *khāṣṣ*, the latter becomes explanatory to the former and both are retained. For the majority, the 'āmm is like the *ẓāhir* in that both are speculative and both are open to qualification and *ta'wīl*.⁶⁵ The two foregoing approaches to *takhṣīs* may be illustrated by the conflict arising in the following two *ḥadīth* concerning legal alms (*zakāh*). One of these provides, 'Whatever is watered by the sky is subject to a tithe.'

ما سقته السماء ففيه العشر.

The second *ḥadīth* provides, 'There is no charity in less than five *awsāq*.'⁶⁶

ليس فيما دون خمس أوساق صدقة.

A *wasāq* (sing. of *awsāq*) is a quantitative measure equivalent to about ten kilograms. The first *ḥadīth* contains a general ruling in respect of any quantity of agricultural crops, but the second *ḥadīth* is specific on this point. The majority of 'ulamā' (including the Shāfi'is) have held that the second *ḥadīth* explains and qualifies the first. The first *ḥadīth* lays down the general principle and the second enacts the quorum (*miṣāb*) of *zakāh*. For the Hanafis, however, the first *ḥadīth* abrogates the second, as they consider that the first *ḥadīth* is of a later origin than the second. According to the Hanafis, when the 'āmm is of a later origin than the *khāṣṣ*, the former abrogates the latter completely. Hence there is no case for *takhṣīs* and the Hanafis, as a result, impose no minimum quantitative limit with regard to *zakāh* on produce obtained through dry farming. The two views remain far apart, and there is no meeting ground between them. However, as already indicated, the majority opinion is sound, and recourse to abrogation in cases of conflict between the 'āmm and *khāṣṣ* is often found to be unnecessary. In modern law, too, one often notices that the particular usually

qualifies the general, and the two can co-exist. The 'āmm and the *khāṣṣ* can thus each operate in their respective spheres with or without a discrepancy in their time of origin and the degree of their respective strength.⁶⁷

IV. Classification (C): The Absolute (*Muṭlaq*) and the Qualified (*Muqayyad*)

Muṭlaq denotes a word which is neither qualified nor limited in its application. When we say, for example, a 'book', a 'bird' or a 'man', each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the *muṭlaq* is unspecified and unqualified. The *muṭlaq* differs from the 'āmm, however, in that the latter includes all to which it applies whereas the former can apply to any one of a multitude, but not to all.⁶⁸ However, the 'ulamā' have differed regarding the definition of *muṭlaq* and the *muqayyad*. To some 'ulamā', including al-Bayḍāwī, the *muṭlaq* resembles the 'āmm, and the *muqayyad* resembles the *khāṣṣ*. Hence anything which specifies the 'āmm can qualify the *muṭlaq*. Both are open to *ta'wīl* and *muṭlaq*/*muqayyad* are complementary to 'āmm/*khāṣṣ* respectively.⁶⁹ When the *muṭlaq* is qualified by another word or words it becomes a *muqayyad*, such as qualifying 'a book' as 'a green book', or 'a bird' as 'a huge bird' or 'a man' as 'a wise man'. The *muqayyad* differs from the *khāṣṣ* in that the former is a word that implies an unspecified individual/s who is/are merely distinguished by certain attributes and qualifications. An example of *muṭlaq* in the Qur'ān is the expiation (*kaffārah*) of futile oaths, which is freeing a slave (*fa-tahrīru rāqabatin*) in sūra al-Mā'idah, (5:92). The command in this text is not limited to any kind of slave, whether Muslim or non-Muslim. Yet in another Qur'ānic passage the expiation of erroneous killing consists of 'freeing a Muslim slave' (*fa-tahrīru rāqabatin mu'minatin*) (al-Nisā', 4:92). In contrast to the first text which is conveyed in absolute terms, the command in the second *āyah* is qualified in that the slave to be released must be a Muslim.

The *muṭlaq* remains absolute in its application unless there is a limitation to qualify it. Thus the Qur'ānic prohibition of marriage 'with your wives' mothers' in sūra al-Nisā' (4:23) is conveyed in absolute terms, and as such, marriage with one's mother-in-law is forbidden regardless as to whether the marriage with her daughter has been consummated or not. Since there is no indication to qualify the terms of the Qur'ānic command, it is to be implemented as it is. But when a *muṭlaq* is qualified into a *muqayyad*, the latter is to be given

priority over the former. Thus if we have two texts on one and the same subject, and both convey the same ruling (*hukm*) as well as both having the same cause (*sabab*) but one is *muṭlaq* and the other *muqayyad*, the latter prevails over the former. To illustrate this in the Qur'ān, we refer to the two *āyāt* on the prohibition of blood for human consumption. The first of these, which occurs in absolute terms, provides: 'Forbidden to you are the dead carcass and blood' (al-Mā'idah, 5:3).

حرمت عليكم الميتة والدم

But elsewhere in the Qur'ān there is another text on the same subject which qualifies the word 'blood' as 'blood shed forth' (al-An'ām, 6:145).

دما مسفوحا

This second *āyah* is a *muqayyad* whereas the first is *muṭlaq*, and the *muqayyad* therefore prevails. It will be noted here that the two texts convey the same ruling, namely prohibition, and that they have the same cause or subject in common (i.e. consumption of blood). When this is the case, the 'ulamā' are in agreement that the *muqayyad* qualifies the *muṭlaq* and prevails over it.⁷⁰

However, if there are two texts on the same issue, one absolute and the other qualified, but they differ with one another in their rulings and in their causes, or in both, then neither is qualified by the other and each will operate as it stands. This is the view of the Ḥanafī and Mālikī schools, and the Shāfi'is concur insofar as it relates to two texts which differ both in their respective rulings and their causes. However, the Shāfi'is maintain the view that if the two texts vary in their ruling (*hukm*) but have the same cause in common, the *muṭlaq* is qualified by the *muqayyad*. This may be illustrated by referring to the two Qur'ānic *āyāt* concerning ablution, one of which reads, in an address to the believers, to 'wash your faces and your hands [*aydikum*] up to the elbows' (al-Mā'idah, 5:6).

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قُمْتُمْ إِلَى الصَّلَاةِ فَاغْسِلُوا وُجُوهَكُمْ

وَأَيْدِيَكُمْ إِلَى الْمَرَافِقِ

The washing of hands in this *āyah* has been qualified by the succeeding phrase that is 'up to the elbows'. The second Qur'ānic provision

which we are about to quote occurs in regard to *tayammum*, that is, ablution with clean sand in the event where no water can be found, in which case the Qur'ān provides, 'take clean sand and wipe your faces and your hands' (al-Nisā', 4:43).

فَتَيَمَّمُوا صَعِيدًا طَيِّبًا وَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ

The word '*aydikum*' (your hands) occurs as a *muqayyad* in the first text but as a *muṭlaq* in the second. However, the two texts have the same cause in common, which is cleanliness for *ṣalāh*. There is admittedly a difference between the two rulings, in that the first requires washing, and the second wiping, of the hands, but this difference is of no consequence. The first is a *muqayyad* in regard to the area of the hands to be washed whereas the second is conveyed in absolute terms. The second is therefore qualified by the first, and the *muqayyad* prevails. Consequently, in wiping the hands in *tayammum*, too, one is required to wipe them up to the elbows.

And lastly we give another illustration, again of two texts, one *muṭlaq*, the other *muqayyad*, both of which convey the same ruling but differ in respect of their causes. Here we refer to the two Qur'ānic *āyāt* on the subject of witnesses. One of these, which requires the testimony of two witnesses in all commercial transactions, is conveyed in absolute terms, whereas the second is qualified. The first of the two texts does not qualify the word 'men' when it states 'and bring two witnesses from among your men' (al-Baqarah, 2:282).

وَأَشْهَدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ

But the second text on same subject conveys a qualified command when it states, 'and bring two just witnesses [when you revoke a divorce]' (al-Talāq, 65:2).

وَأَشْهَدُوا ذَوَى عَدْلٍ مِنْكُمْ

The ruling in both texts is the same, namely the requirement of two witnesses, but the two rulings differ in respect of their causes. The cause of the first text, as already noted, is commercial transactions which must accordingly be testified to by two men; whereas the cause of the second ruling is the revocation of *talāq*. In the first *āyah* witnesses are not qualified, but they are qualified in the second *āyah*. The latter prevails over the former. Consequently, witnesses in both

commercial transactions and the revocation of *ṭalāq* must be upright and just.⁷¹

The foregoing basically represents the majority opinion. But the Hanafis maintain that when the *muḡayyad* and the *muṣṭaq* differ in their causes, the one does not qualify the other and that each should be implemented independently. The Hanafis basically recognise only one case where the *muḡayyad* qualifies the *muṣṭaq*, that is, when both convey the same ruling and have the same cause in common. But when they differ in either of these respects or in both, then each must stand separately. In this way the Hanafis do not agree with the majority in regard to the qualification of the area of the arms to be wiped in *tayammum* by the same terms which apply to ablution by water (*wuḡū*). The Hanafis argue that the *ḥukm* in regard to *tayammum* is conveyed in absolute terms and must operate as such. They contend that, unlike *wuḡū*, *tayammum* is a *sharʿī* concession, and the spirit of concession should prevail in the determination of its detailed requirements, including the area of the arm that is to be wiped.⁷²

V. Classification (D): The Literal (*Ḥaqīqī*) and the Metaphorical (*Majāzī*)

A word may be used in its literal sense, that is, for its original or primary meaning, or it may be used in a secondary and metaphorical sense. When a word is applied literally, it keeps its original meaning but, when it is used in a metaphorical sense, it is transferred from its original to a secondary meaning on grounds of a relationship between the two meanings.⁷³ There is normally a logical connection between the literal and the metaphorical meanings of a word. The nature of this relationship varies and extends over a wide range of possibilities. There are at least thirty to forty variations in how the metaphorical usage of a word may relate to its literal meaning.⁷⁴ The metaphorical usage of a word thus consists of a transfer from an original to a connected meaning. Once such a transfer has taken place, both the original and the metaphorical meanings of a word cannot be assigned to it at one and the same time.

Words are normally used in their literal sense, and in the language of the law it is the literal meaning that is relied upon most. Hence if a word is simultaneously used in both these senses, the literal will prevail. When, for example, a person says in his will that 'I bequeath my property to the memorisers of the Qur'ān' or to 'my offspring', those who might have memorised the Qur'ān but have forgotten it

since will not be entitled. Similarly, 'offspring' (*awlād*) primarily means sons and daughters, not grandchildren, as applying 'awlād' to 'grandchildren' is a metaphorical usage that is secondary to its original meaning.⁷⁵

Both the *ḥaqīqī* and the *majāzī* occur in the Qur'ān, and they each convey their respective meanings. Thus when we read in the Qur'ān to 'kill not [*lā taqtulū*] the life which God has made sacrosanct', '*la taqtulū*' conveys a literal meaning. Similarly, the *majāzī* occurs frequently in the Qur'ān. When, for example, we read in the Qur'ān that God 'sends down your sustenance from the heavens' (Ghāfir, 40:13)

وَيُرِلْ لَكُمْ مِنَ السَّمَاءِ رِزْقًا

this means rain which causes the production of food. Some '*ulamā*' have observed that *majāzī* is of the nature of a homonym which could comprise what may be termed as falsehood, or that which has no reality and truth, and that falsehood has no place in the Qur'ān. Imam Ghazālī discusses this argument in some length and represents the majority view when he refutes it and acknowledges the existence of the *majāzī* in the Qur'ān. The Qur'ānic expression, for example, that 'God is the light of the heavens and the earth' (al-Nūr, 24:35)

اللَّهُ نُورُ السَّمَوَاتِ وَالْأَرْضِ

and 'whenever they [the Jews] kindled the fire of war, God extinguished it' (al-Mā'idah, 5:64),

كَلِمَا أَوْقَدُوا نَارًا لِلْحَرْبِ أَطْفَأَهَا اللَّهُ

God being 'the light of the universe', and God having 'extinguished the fire of war', are both metaphorical usages; and numerous other instances of the *majāzī* can be found in the Qur'ān.⁷⁶ As already stated, the *ḥaqīqī* and the *majāzī* both occur in the Qur'ān, and they each convey their respective meanings, but this is only the case where the *majāzī* does not represent the dominant usage. In the event where a word has both a literal and a metaphorical meaning and the latter is well-established and dominant, it is likely to prevail over the former. Some '*ulamā*' have, however, held the opposite view, namely, that the *ḥaqīqī* will prevail in any case; and according to yet a third view, both are to be given equal weight. But the first of these views represents the view of the majority. To give an example, the word '*ṭalāq*'

literally means 'release' or 'removal of restriction' (*izālah al-qayd*), be it from the tie of marriage, slavery, or ownership, etc. But since the juridical meaning of *ṣalāh*, which is dissolution of marriage, or divorce, has become totally dominant, it is this meaning that is most likely to prevail, unless there is evidence to suggest otherwise.⁷⁷

The *ḥaqīqī* is sub-divided, according to the context in which it occurs, into linguistic (*luḡawī*), customary (*ʿurfī*) and juridical (*sharʿī*). The linguistic *ḥaqīqī* is a word which is used in its dictionary meaning, such as 'lion' for that animal, and 'man' for the male gender of the human being. The customary *ḥaqīqī* occurs in the two varieties of general and special: when a word is used in a customary sense and the custom is absolutely common among people, the customary *ḥaqīqī* is classified as general, that is, in accord with the general custom. An example of this in Arabic is the word '*dābbah*' which in its dictionary meaning applies to all living beings that walk on the face of the earth, but which has been assigned a different meaning by general custom, that is, an animal walking on four legs. But when the customary *ḥaqīqī* is used for a meaning that is common to a particular profession or group, the customary *ḥaqīqī* is classified as special, that is, in accord with a special custom. For example, the Arabic words *raf* ('nominative') and *naṣb* ('accusative') have each acquired a technical meaning that is common among grammarians and experts in the language.

There is some disagreement as to the nature of the juridical *ḥaqīqī*, as some '*ulamā*' consider this to be a variety of the *ḥajāzī*, but having said this, the juridical *ḥaqīqī* is defined as a word which is used for a juridical meaning that the Lawgiver has given it in the first place, such as '*ṣalāh*', which literally means 'supplication' but which, in its well-established juridical sense, is a particular form of worship. Similarly, the word *ṣakāh* literally means 'purification', but in its juridical sense, denotes a particular form of charity whose details are specified by the Shari'ah.⁷⁸

It would take us too far afield to describe the sub-divisions of the *majāzī*, as we are not primarily concerned with technical linguistic detail. Suffice it to point out here that the *majāzī* has also been divided into linguistic, customary and juridical varieties. However, there is one other classification which merits our attention; this is the division of the *ḥaqīqī* and *majāzī* into plain (*ṣarīḥ*) and allusive (*kināyah*).

If the application of a word is such that it clearly discloses the speaker's intention, it is plain; otherwise it is allusive. The highest degree of clarity in expression is achieved by the combination of the plain (*ṣarīḥ*) and the literal (*ḥaqīqī*) such as the sentence 'Aḥmad bought

a house', or 'Fāṭima married Aḥmad'. The plain may also be combined with the metaphorical, as in the sentence 'I ate from this tree', where the meaning intended is 'from the fruit of this tree'.

The 'allusive' or *kināyah* denotes a form of speech that does not clearly disclose the intention of its speaker and can occur in combination with the literal or the metaphorical. When a person wishes, for example, to confide in his colleague in front of others, he might say, 'I met your friend and spoke to him about the matter that you know'. This is a combination of the literal and the allusive in which all the words used convey their literal meanings but where the whole sentence is allusive in that it does not disclose the purpose of the speaker with clarity. Supposing that a man addresses his wife and tells her in Arabic '*fī tadī*' ('start counting') while intending to divorce her. This utterance is allusive, as 'counting' literally means taking a record of numbers, but is used here in reference to counting the days of the waiting period of '*iddah*'. This speech is also metaphorical in that the '*iddah*' which is caused by divorce is used as a substitute for 'divorce'. It is a form of *majāzī* in which the effect is used as a substitute for the cause.⁷⁹

When speech consists of plain words, the intention of the person using them is to be discerned from the words themselves, and there is no room for further enquiry as to the intention of the speaker. Thus when a man tells his wife 'you are divorced', the divorce is pronounced in plain words and occurs regardless of the husband's intention. But in the case of allusive words, one has to ascertain the intention behind them and the circumstances in which they were uttered. Thus when a man tells his wife 'you are forbidden to me', or when he asks her to 'join your relatives', no divorce will take place unless there is evidence to show that the husband intended a divorce.⁸⁰

Legal matters that require certainty, such as offences entailing the *ḥadd* punishment, cannot be established by language which is not plain. For example, when a person confesses to such offences in allusive words, he is not liable to punishment.⁸¹

The jurists are in agreement that a word may be used metaphorically while still retaining its literal meaning, such as the word '*umm*' (mother) which the Arabs sometimes use metaphorically for 'grand-mother' and yet still retains its literal meaning. But there is disagreement among the '*ulamā*' of *uṣūl* as to whether both the literal and metaphorical meanings of a word can be applied simultaneously. When, for example, a man orders his servant to 'kill the lion', could this also include a brave person? The Hanafīs and the Mu'tazilīh have answered

this question in the negative, saying that words normally carry their literal meanings unless there is evidence to warrant departure to another meaning. The Shāfi'is and the 'ulamā' of ḥadīth have held, on the other hand, that the literal and the metaphorical meaning of a word can be simultaneously applied. They have thus validated either of the two meanings of the Qur'ānic provision, 'or when you have touched women' (al-Nisā', 4:43)

أو لامستم النساء

which could mean touching the women with the hand, or touching in the sense of having sexual intercourse. The text in which this *āyah* occurs spells out the circumstances that break the state of purity. Thus when a Muslim 'touches a woman' he must take a fresh ablution for the next *ṣalāh*. But according to the Hanafīs, the Qur'ānic *āyah* on this point only conveys the metaphorical meaning of 'touching', that is, sexual intercourse. Hence when a person is in the state of ablution, and then touches a woman by the hand, his ablution remains intact. For the Shāfi'is, however, the key word in this *āyah* carries both its literal and metaphorical meanings simultaneously. Consequently, the state of purity is broken, not only by sexual intercourse, but also by a mere touch such as a handshake with a woman who is not of one's family.⁸²

V.1 The Homonym (*Mushtarak*)

A homonym is a word with more than one meaning. Some 'ulamā', including al-Shāfi'ī, have held the view that the homonym is a variety of *ʾamm*. The two are, however, different in that the homonym inherently possesses more than one meaning, which is not necessarily the case with the *ʾamm*. An example of the *mushtarak* in Arabic is the word *ʾayn* which means several things, including eye, water-spring, gold, and spy. Similarly the word *qurʾ* has two meanings, namely menstruation, and the clean period between two menstruations. The Hanafīs, the Hanbalīs and the Zaydis have upheld the first, while the Shāfi'is, Mālikīs and Ja'farīs have upheld the second meaning of *qurʾ*.⁸³

The plurality of meanings in a homonym may be due to the usage of different Arab tribes and communities. Some used it for one meaning, others for the other; otherwise a word may have acquired a metaphorical meaning which became literal in the course of time. When *mushtarak* occurs in the Qur'ān or *Sunnah*, it denotes one

meaning alone, not more than one, for the Lawgiver does not intend more than one meaning for a word at any given time. The Shāfi'is and some Mu'tazilīs have taken exception to this view as they maintain that, in the absence of any indication in support of one of the two or more meanings of a *mushtarak*, both or all may be upheld simultaneously provided that they do not contradict one another. According to a variant view, however, plurality of meanings on a simultaneous basis is permissible in negation or denial (*nafy*) but not in affirmation and proof (*iṭbāt*). If, for example, Aḥmad says 'I did not see a *ʾayn* (*ma ra'aytu ʾaynan*)', *ʾayn* in this negative statement could comprise all its various meanings.⁸⁴ This view, however, does not extend to commands and prohibitions that do not admit affirmation or denial as such. The rule in regard to commands and prohibitions of the *Sharʿah* is that the Lawgiver does not intend to uphold more than one of the different meanings of a homonym at any given time. An example of a homonym which occurs in the context of a Qur'ānic command is the word *yad* ('hand') in 'as for the thief, male or female, cut off their hands' (al-Mā'idah, 5:38).

السارق والسارقة فاقطعوا أيديهما

'Hand' in this *āyah* has not been qualified in any way, hence it can mean 'hand' from the tip of the fingers up to the wrist, or up to the elbow, or even up to the shoulder; it also means left or right hand. But the 'ulamā' have agreed on the first and the last of these meanings, that is, the right hand, up to the wrist.⁸⁵ To illustrate the homonym in the context of a prohibitory order in the Qur'ān, we refer to the word *nakāḥa* in *sūra al-Nisā'* (4:22) which reads, 'And marry not women whom your fathers had married.'

ولا تنكحوا ما نكح آبائكم من النساء

'*Nakāḥa*' is a homonym which means both marriage and sexual intercourse. The Hanafīs, the Hanbalīs, al-Awzā'ī and others have upheld the latter, whereas the Shāfi'is and the Mālikīs have upheld the former meaning of *nakāḥa*. According to the first view, a woman who has had sexual intercourse with a man is forbidden to his children and grandchildren; a mere contract of marriage, without consummation, would thus not amount to a prohibition in this case. The Shāfi'is and Mālikīs, however, maintain that the text under discussion only refers to the contract of marriage. Accordingly, a woman who has entered

a contract of marriage with one's father or grandfather is unlawful for one to marry regardless as to whether the marriage has been consummated or not.⁸⁶

To determine which of the two or more meanings of the *mushtarak* is to be upheld in a particular locution, reference is usually made to the context and circumstances in which it occurs. If it is a locution that pertains to the *Shari'ah*, then determining the precise purport of its words must also take into consideration the general principles and objectives of the *Shari'ah*. The *mushtarak* has a *mushkil* (difficult) nature and it is for the *mujtahid* to determine its correct meaning by means of research and *ijtihad*; it is his duty to do so in the event where *mushtarak* constitutes the basis of a judicial order.⁸⁷ The *mujtahid* will normally look into the context. When, for example, a homonym has two meanings, one literal and the other juridical, and it occurs in a juridical context, then as a rule the juridical meaning will prevail. With words such as *ṣalāh* and *ṭalāq*, for example, each possesses a literal meaning, that is 'supplication' and 'release' respectively, but when they occur in a juridical context, then their juridical meanings will take priority. As such, *ṣalāh* would be held to refer to a particular form of worship, and *ṭalāq* would mean 'dissolution of marriage'.

Finally, it will be noted in passing that *mushtarak* as a concept is not confined to nouns but also includes verbs. In our discussion of commands and prohibitions in a separate chapter, we have shown how a word in its imperative mood can impart more than one meaning. We have also discussed and illustrated the words of the Qur'an that occur in the imperative mood, but the juridical value that they convey can either be an obligatory command, a recommendation, or mere permissibility.

NOTES

1. Cf. Abdur Rahim, *Jurisprudence*, p. 78.
2. Badrān, *Bayān*, pp. 124ff.
3. Khallāf, 'Ilm, pp. 167-8.
4. Āmidī, *Ihkām*, III, 53; Badrān, *Uṣūl*, p. 400.
5. Āmidī, *Ihkām*, III, 54; Badrān, *Uṣūl*, pp. 400-401.
6. Tabrizi, *Mishkāt*, III, 948, *hadith* no. 3178; Āmidī, *Ihkām*, II, 54; Badrān, *Uṣūl*, p. 401.
7. Āmidī, *Ihkām*, III, 56; Badrān, *Uṣūl*, p. 401. See for more examples of far-fetched interpretation, Āmidī, *Ihkām* III, 55-64.
8. Badrān, *Uṣūl*, p. 402.

9. Khallāf, 'Ilm, p. 166.
10. Khallāf, 'Ilm, p. 162; Badrān, *Uṣūl*, p. 409.
11. Ibid., p. 161; Badrān, *Uṣūl*, p. 403; Abū Zahrah, *Uṣūl*, p. 93.
12. Abū Zahrah, *Uṣūl*, p. 93; Badrān, *Uṣūl*, p. 402.
13. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 51, *hadith* no. 2060; Khallāf, 'Ilm, p. 163; Abū Zahrah, *Uṣūl*, p. 94.
14. Tabrizi, *Mishkāt*, II, 1203, *hadith* no. 4132.
15. Abū Dāwūd, *Sunan*, II, 410, *hadith* no. 1567.
16. Khallāf, 'Ilm, p. 165; Āmidī (*Ihkām*, III, 57) considers this to be a *ta'wīl* which is far-fetched.
17. Khallāf, 'Ilm, p. 166.
18. Abū Zahrah, *Uṣūl*, p. 95.
19. Cf. Khallāf, 'Ilm, p. 166.
20. Abū Zahrah, *Uṣūl*, p. 96; Badrān, *Uṣūl*, pp. 404-405.
21. Tabrizi, *Mishkāt*, I, 1215, *hadith* no. 683; Shāṭibī, *Minṣajāt*, III, 178; Khallāf, 'Ilm, p. 167; Badrān, *Uṣūl*, p. 405.
22. Badrān, *Uṣūl*, p. 404.
23. Abū Dāwūd, *Sunan*, I, 76, *hadith* nos. 194 and 304, respectively.
24. Ibid.
25. Khallāf, 'Ilm, p. 169; Badrān, *Uṣūl*, p. 408.
26. Hughes, *Dictionary of Islam*, p. 518; Badrān, *Uṣūl*, p. 406; Abū Zahrah, *Uṣūl*, p. 96.
27. Abū Dāwūd, *Sunan*, II, 702, *hadith* no. 2526; Abū Zahrah, *Uṣūl*, p. 96.
28. Abū Zahrah, *Uṣūl*, p. 96; Badrān, *Uṣūl*, p. 406.
29. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 555, *hadith* no. 2078; Badrān, *Uṣūl*, p. 408.
30. Badrān, *Uṣūl*, p. 409.
31. Khallāf, 'Ilm, p. 170; Badrān, *Uṣūl*, p. 410.
32. Shāfi'i, *Risālah*, p. 80.
33. Badrān, *Uṣūl*, p. 411.
34. Khallāf, 'Ilm, p. 173; Badrān, *Uṣūl*, p. 413.
35. Zarkashī, *al-Bahr*, III, 463.
36. Muslim, *Ṣaḥīḥ Muslim*, p. 252, *hadith* no. 949; Khallāf, 'Ilm, pp. 173-5; Badrān, *Uṣūl*, pp. 414-5.
37. Zarkashī, *al-Bahr*, III, 456.
38. *The Holy Qur'an* (Yūsuf Ali's trans.), p. 118; von Denffer, 'Ulūm, p. 84; Abdur Rahim, *Jurisprudence*, p. 100.
39. Badrān, *Uṣūl*, p. 416.
40. Khallāf, 'Ilm, p. 176.
41. Ghazālī, *Mustafā*, I, 68.
42. Shawkānī, *Iṣḥād*, pp. 31-2.
43. Ghazālī, *Mustafā*, II, 12; Abdur Rahim, *Jurisprudence*, p. 79.
44. Khallāf, 'Ilm, p. 178; Badrān, *Uṣūl*, p. 375.
45. Badrān, *Uṣūl*, p. 370.
46. Abdur Rahim, *Jurisprudence*, p. 79.
47. Shāṭibī, *Minṣajāt*, III, 154.
48. Badrān, *Uṣūl*, pp. 386-387; Khallāf, 'Ilm, p. 185.

49. For further details on this issues, see Karnali, *Punishment in Islamic Law*, pp. 90 and 104.
50. Zarkashī, *al-Bahr*, III, 361-76; Zaydan, *Wajiz*, p. 311.
51. Khallāf, 'Ilm p. 182ff; Badrān, *Uṣūl*, pp. 371ff; Abdur Rahim, *Jurisprudence*, pp. 86ff.
52. Shāṭibī, *Muwāḍḍaʿāt*, III, 153; Abū Zahrah, *Uṣūl*, p. 174; Abdur Rahim, *Jurisprudence*, p. 81.
53. Abū Zahrah, *Uṣūl*, p. 125; Badrān, *Uṣūl*, p. 381.
54. Bayhaqī, *al-Sunan al-Kubrā*, VII, 140; Badrān, *Uṣūl*, p. 383.
55. Shawkānī, *Iṣḥād*, p. 157; Abū Zahrah, *Uṣūl*, p. 125.
56. Abdur Rahim, *Jurisprudence*, pp. 83-4; Khallāf, 'Ilm, p. 187; Badrān, *Uṣūl*, pp. 375-8.
57. Abū Zahrah, *Uṣūl*, p. 128; Abdur Rahim, *Jurisprudence*, p. 84; Badrān, *Uṣūl*, p. 379.
58. Badrān, *Uṣūl*, p. 376.
59. Abū Zahrah, *Uṣūl*, pp. 128-9.
60. Ibid., p. 129.
61. Ghazālī, *Mustaṣḍāf*, II, 103-105.
62. Khallāf, 'Ilm p. 183; Abū Zahrah, *Uṣūl*, p. 129.
63. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 1149; *ḥadīth* no. 411; Abū Zahrah, *Uṣūl*, p. 130.
64. Abū Zahrah, *Uṣūl*, p. 130; Khallāf, 'Ilm, p. 189.
65. Ibid., p. 131; Badrān, *Uṣūl*, p. 383.
66. Tabrizī, *Mishkāt*, I, 563-65, *ḥadīth* nos. 1794 and 1797; Abū Zahrah, *Uṣūl*, p. 131.
67. Cf. Abū Zahrah, *Uṣūl*, p. 132.
68. Khallāf, 'Ilm, p. 192; Badrān, *Uṣūl*, pp. 351, 371.
69. Anṣārī, *Ghāyat al-Wuṣūl*, p. 84.
70. Khallāf, 'Ilm, p. 193; Abdur Rahim, *Jurisprudence*, pp. 91-2.
71. Ibid., p. 194; Badrān, *Uṣūl*, p. 354.
72. Ibid., pp. 193-4.
73. Abdur Rahim, *Jurisprudence*, p. 93; Badrān, *Uṣūl*, p. 394.
74. See for details Shawkānī, *Iṣḥād*, pp. 23-4.
75. Badrān, *Uṣūl*, p. 395; Hita, *Wajiz*, p. 115.
76. Ghazālī, *Mustaṣḍāf*, I, 67-78.
77. Hita, *Wajiz*, p. 115.
78. Badrān, *Uṣūl*, p. 394; Hita, *Wajiz*, p. 112.
79. See for further detail on the various forms of the *Majāzī*; Abdur Rahim, *Jurisprudence*, pp. 94-7; Badrān, *Uṣūl*, pp. 397ff.
80. Badrān, *Uṣūl*, p. 397.
81. Abdur Rahim, *Jurisprudence*, p. 98.
82. Badrān, *Uṣūl*, p. 397.
83. Abū Zahrah, *Uṣūl*, p. 132; EI⁹, IV, 101.
84. Shawkānī, *Iṣḥād*, p. 32; Ismāwī, *Nihāyah*, I, 166; Abū Zahrah, *Uṣūl*, p. 133.
85. Khallāf, 'Ilm, p. 180.
86. Badrān, *Bayān*, pp. 103-104.
87. Abū Zahrah, *Uṣūl*, p. 133; Khallāf, 'Ilm, p. 179.

CHAPTER FIVE

Rules of Interpretation II: *al-Dalālāt* (Textual Implications)

The law normally requires compliance not only with the obvious meaning of its texts but also with its implied meanings, and indirect indications and inferences that could be drawn from them. With reference to the textual rulings of the Qur'an and the *Sunnah*, the 'ulamā' of *uṣūl* have distinguished several shades of meaning that a *naṣṣ* may be capable of imparting. The Hanafi jurists have distinguished four levels of meaning in an order which begins with the explicit or immediate meaning of the text. Next in this order is the 'alluded' meaning which is followed by the 'inferred' meanings, and lastly by the 'required' meaning. There is yet a fifth variety of meaning, namely the 'divergent' meaning, which is somewhat controversial but has, in principle, been accepted, as our discussion will show. The explicit meaning ('*ibārah al-naṣṣ*'), which is based on the words and sentences of the text, is the dominant and most authoritative meaning which takes priority over the other levels of implied meanings that might be detectable in the text. In addition to its obvious meaning, a text may impart a meaning which is indicated by the signs and allusions that it might contain. This secondary meaning is referred to as *ishārah al-naṣṣ*, that is the alluded meaning. A legal text may also convey a meaning which may not have been indicated by words or signs and yet is a complementary meaning warranted by the logical and juridical purport of the text. This is known as *dalālah al-naṣṣ*, or the inferred meaning, which is one degree below the alluded meaning by virtue of the fact that it is essentially extraneous to the text. But as will later

be discussed, there is a difference of opinion between the Hanafī and the Shāfi'ī jurists as to whether the inferred meaning should necessarily be regarded as inferior to the alluded meaning. Next in this order is the *iqtiḍā' al-naṣṣ*, or the required meaning, which is once again a logical and necessary meaning without which the text would remain incomplete and would fail to achieve its desired purpose.¹ When there is a conflict between the first and the second meanings, priority is given to the first. Similarly, the second will take priority over the third and the third over the fourth, as we shall presently explain.

I. The Explicit Meaning (*Ibārah al-Naṣṣ*)

As already stated, this is the immediate meaning of the text derived from its obvious words and sentences. The explicit meaning represents the principal theme and purpose of the text, especially in cases where the text might impart more than one meaning and comprises in its scope a subsidiary theme or themes in addition to the obvious one. In its capacity as the obvious and dominant meaning, the *'ibārah al-naṣṣ* is always given priority over the secondary and subsidiary themes or meanings of a text. To illustrate this, we refer to the Qur'ānic passage on the subject of polygamy, a text which conveys more than one meaning, as follows: 'And if you fear that you may be unable to treat the orphans fairly, then marry of the women who seem good to you, two, three or four. But if you fear that you cannot treat [your co-wives] equitably, then marry only one' (al-Nisā', 4:3).

وإن خفتم ألا تقسطوا في اليتامى فانكحوا ما طاب لكم
من النساء مثنى وثلاث ورباع وإن خفتم ألا تعدلوا فواحدة

At least three or four meanings are distinguishable in this text which are: first, the legality of marriage, a meaning which is conveyed by the phrase *fankihū mā ṭāba lakum min al-nisā'* ('marry of the women who seem good to you'); second, limiting polygamy to the maximum of four; third, remaining monogamous if polygamy may be feared to lead to injustice; and fourth, the requirement that orphaned girls must be accorded fair treatment, a meaning which is indicated in the first part of the text. All these are conveyed in the actual words and sentences of the text; but the first and the last are subsidiary and incidental whereas the second and the third represent the explicit

themes and meanings of the text, that is, the *'ibārah al-naṣṣ*. Limiting polygamy to the maximum of four is the explicit meaning which takes absolute priority over all the implied and incidental meanings that this text might convey.²

Most of the *nusūṣ* of *Shari'ah* convey their rulings by way of *'ibārah al-naṣṣ*. Thus the command to perform the obligatory prayers, to observe the fast during Ramaḍān, to enforce the prescribed penalties for certain offences, to give specified shares to the legal heirs in inheritance, etc., are all instances of *'ibārah al-naṣṣ*. The effect of *'ibārah al-naṣṣ* is that it conveys a definitive ruling (*hukm qaṭ'i*) on its own and is in no need of corroborative evidence. But if the text is conveyed in general terms, it may be susceptible to qualification, in which case it may not impart a definitive rule of law but constitute speculative (*ẓanni*) evidence only.³

II. The Alluded Meaning (*Ishārah al-Naṣṣ*)

The text itself may not be obvious with regard to its alluded meaning, but it imparts, nevertheless, a rationally concomitant meaning that is obtained through further investigation of the signs that might be detectable therein. Since the alluded meaning does not represent the principal theme of the text and yet embodies a necessary inference, it is called *ishārah al-naṣṣ*. The alluded meaning may be easily detectable in the text, or may be reached through deeper investigation and *ijtihād*. An example of the *ishārah al-naṣṣ* in the Qur'ān is the text concerning the maintenance of young children which provides: 'It is his [father's] duty to provide them with maintenance and clothing according to custom' (al-Baqarah, 2:233).

وعلى المولود له رزقهن وكسوتهن بالمعروف

The explicit meaning of this text obviously determines that it is the father's duty to support his child. It is also understood from the wording of the text, especially from the use of the pronoun '*lahu*' (his) that only the father and no-one else bears this obligation. This much is easily detectable and constitutes the explicit meaning of this text. But to say that the child's descent is solely attributed to the father, and that his identity is determined with reference to that of the father, is a rational and concomitant meaning that is derived through further investigation of the signs detectable in the text.⁴ Similarly, the rule that the father, when in dire need, may take what he needs of the

property of his offspring without the latter's permission is yet another meaning which is derived by way of *ishārah al-naṣṣ*. This meaning is derived from the combination of the text under discussion and the *ḥadīth* of the Prophet which proclaims that 'you and your property both belong to your father'.⁵

أنت ومالك لوالدك.

Another example of a combination of explicit and alluded meanings occurring in the same text is the Qur'anic *āyah* on the permissibility of divorce which states in an address to the believers: 'There shall be no blame on you if you divorce your wives with whom you had no sexual intercourse, nor had you assigned for them a dower' (al-Baqarah, 2:236).

ولا جناح عليكم إن طلقتم النساء ما لم تمسوهن أو تفرضوا لهن فريضة

The explicit meaning of this text is that divorce is permissible prior to the consummation of marriage and the assignment of a dower. The alluded meaning here is the legality of concluding a contract of marriage without the assignment of a dower (*mahr*), for a divorce can only occur when there is a subsisting marriage. The text implies this to be the case, and that a marriage can legally exist even without the assignment of a *mahr*.⁶

To give yet another example of *ishārah al-naṣṣ* we may refer to the Qur'anic text on consultation (*shūrā*) where we read, in an address to the Prophet, 'So pardon them [the Companions] and ask for [God's] forgiveness for them and consult them in affairs' (Āl 'Imrān, 3:159).

فاعف عنهم واستغفر لهم وشاورهم في الأمر

The '*ibārah al-naṣṣ* in this text requires that community affairs must be conducted through consultation. The alluded meaning of this text requires the creation of a consultative body in the community to facilitate the consultation required by the obvious text.

The effect of *ishārah al-naṣṣ* is similar to that of '*ibārah al-naṣṣ* in that both constitute the basis of obligation, unless there is evidence to suggest otherwise. To illustrate this, we may refer once again to the

Qur'anic text (al-Baqarah, 2:223) which lays down the rule that the child follows the descent of his father. This is a definitive ruling (*ḥukm qaf'i*) which has, however, been set aside by *ijmā'* in respect of slavery to the effect that the child of a slave does not necessarily inherit the status of his father. In this example, the *ishārah al-naṣṣ* initially laid down a definitive ruling but it has been set aside in respect of slavery by another definitive evidence, namely the *ijmā'*.⁷

III. The Inferred Meaning (*Dalālah al-Naṣṣ*)

This is a meaning that is derived from the spirit and rationale of a legal text even where this is not indicated in its words and sentences. Unlike the explicit meaning and the alluded meaning, which are both indicated in the words and signs of the text, the inferred meaning is not indicated in this way. Instead, it is derived through analogy and the identification of an effective cause (*'illah*) which is in common between the explicit meaning and the meaning that is derived through inference. This might explain why some '*ulamā'* have equated *dalālah al-naṣṣ* with analogical deduction, namely *qiyās jalī*. To illustrate this, we may refer to the Qur'anic text on the obligation to respect one's parents. In particular, the text provides 'and say not "Fie" to them' (al-Isrā' 17:23)

فلا تقل لهما أف

which obviously forbids the utterance of the slightest word of contempt to parents. The effective cause of this prohibition is honouring parents and avoiding offence to them. There are, of course, other forms of offensive behaviour, besides a mere contemptuous word such as 'Fie', to which the effective cause of this prohibition would apply. The inferred meaning of this text is thus held to be that all forms of abusive words and acts which offend parents are forbidden, even if they are not specifically mentioned in the text under consideration.⁸

To give another example, the Qur'an proclaims, concerning the property of orphans, that 'those who unjustly devour the property of the orphans only devour fire into their bodies' (al-Nisā', 4:10).

إن الذين يأكلون أموال اليتامى ظلماً إنما يأكلون في بطونهم نارا

The explicit meaning of this text forbids guardians and executors from devouring the property of their orphaned wards for personal gain. But by way of inference, the same prohibition is extended to other forms of destruction and waste that might have been caused, for example, through financial mismanagement that does not involve personal gain and yet leads to the loss and destruction of the property of orphans. Although the text provides no indication as to the different ways in which destruction can be caused, they are nevertheless equally forbidden. As already stated, this kind of inference is equivalent to what is known as obvious analogy (*qiyās jalī*) which consists of identifying the effective cause of a textual ruling, and when this is identified the original ruling is analogically extended to all similar cases. The effective cause of the ruling in the foregoing *āyah* is protection of the orphans' property, and any act which causes destruction or loss of such property falls under the same prohibition.⁹

IV. The Required Meaning (*Iqtiḍā' al-Naṣṣ*)

This is a meaning on which the text itself is silent and yet which must be read into it if it is to fulfil its proper objective. To give an example, the Qur'an proclaims concerning the prohibited degrees of relations in marriage: 'Unlawful to you are your mothers and your daughters' (al-Nisā', 4:23).

حرمت عليكم أمهاتكم وبناتكم

This text does not mention the word 'marriage', but even so this must be read into the text to complete its meaning. Similarly, we read elsewhere in the Qur'an: 'Unlawful to you are the dead carcass and blood' (al-Mā'idah, 5:3), without mentioning that these are unlawful for consumption.

حرمت عليكم الميتة والدم

But the text requires the missing element to be supplied in order that it may convey a complete meaning.

To give a slightly different example of *iqtiḍā' al-naṣṣ*, we may refer to the *ḥadīth* which states: 'There is no fast [*lā ṣīyāma*] for anyone who has not intended it from the night before.'

لا صيام لمن لم يفرضه من الليل.

The missing element could either be that the fasting is 'invalid' or that it is 'incomplete'. The Ḥanafīs have upheld the latter whereas the Shāfi'īs have read the former meaning into this *ḥadīth*. Whichever meaning is upheld, the consequences that it may lead to will vary accordingly.¹⁰

To summarise, a legal text may be interpreted through the application of any one or more of the four varieties of textual implications. The meaning that is arrived at may be indicated in the words of the text, by the signs that occur therein, by inference, or by the supplementation of a missing element. These methods of legal construction may be applied individually or in combination with one another, and they are all designed to carry the text to its proper and logical conclusions.

As stated above, in the event of a conflict between the *'ibārah al-naṣṣ* and the *ishārah al-naṣṣ*, the former prevails over the latter. This may be illustrated by a reference to the two Qur'anic *āyāt* concerning the punishment of murder. One of these explicitly proclaims that 'retaliation is prescribed for you in cases of murder' (al-Baqarah, 2:178).

كتب عليكم القصاص في القتلى

But elsewhere in the Qur'an, it is provided: 'Whoever deliberately kills a believer, his punishment will be permanent hellfire' (al-Nisā', 4:93).

ومن قتل مؤمنا متعمدا فجزاؤه جهنم خالدا فيها

The explicit meaning of the first *āyah* provides that the murderer must be retaliated against; the explicit meaning of the second *āyah* is that the murderer is punished with permanent hellfire. The alluded meaning of the second *āyah* is that retaliation is not a required punishment for murder; instead the murderer will, according to the explicit terms of this *āyah*, be punished in the Hereafter. There is no conflict in the explicit meanings of the two texts, but only between the explicit meaning of the first and the alluded meaning of the second. A conflict thus arises as to which of the two punishments are to be upheld; but since the first ruling constitutes the explicit meaning of the text

and the second is an alluded meaning, the former prevails over the latter.¹¹

For another illustration of a conflict between the explicit and alluded meanings, we refer to the Qur'anic text which informs the believers of the dignified status of the martyrs, as follows: 'And think not of those who are slain in God's way as dead; they are alive, finding their sustenance in the presence of God' (Āl 'Imrān, 3:169).

ولا تحسبن الذين قتلوا في سبيل الله أمواتا بل أحياء
عند ربهم يرزقون

The explicit terms of this text obviously declare the martyrs to be alive, and that anyone who thinks they are dead is mistaken. The alluded meaning of this text is held to be that no funeral prayer is necessary for the martyr as he is deemed to be still alive. However, this conclusion conflicts with the explicit meaning of another Qur'anic text which orders, concerning the dead in general, to 'pray on their behalf [ṣalli 'alayhim] as your prayers are a source of tranquillity for them' (al-Tawbah, 9:103).

وصل عليهم إن صلاتك سكن لهم

This text explicitly requires prayers for everyone, martyr or otherwise, as they are dead literally and juridically and their property may be inherited by their legal heirs. This is the explicit meaning of this second text and it prevails over the alluded meaning of the first.¹²

To illustrate the conflict between the alluded meaning and the inferred meaning, we refer firstly to the Qur'anic text on the expiation of erroneous killing which states: 'The expiation [kaffārah] of anyone who erroneously kills a believer is to set free a Muslim slave' (al-Nisā', 4:92).

ومن قتل مؤمنا خطأ فتحرير رقبة مؤمنة.

The explicit meaning of this *āyah* is that erroneous homicide must be expiated by releasing a Muslim slave. By way of inference, it is further understood that freeing a Muslim slave would also be required in intentional homicide, for the purpose of *kaffārah* is compensation and atonement for a sin. It is argued that the murderer is also a sinner and has committed a sin far greater than the one who kills as a result of

error. The inferred meaning derived in this way is that the murderer is liable, at least, to the same *kaffārah* which is required in erroneous homicide. However, according to the next *āyah* in the same passage, to which reference has already been made: 'Whoever deliberately kills a believer, his punishment is permanent hell-fire' (al-Nisā', 4:93).

ومن قتل مؤمنا متعمدا فجزاءه جهنم خالدًا فيها.

The alluded meaning of this text is that freeing a slave is not required in intentional killing. This meaning is understood from the explicit terms of this *āyah* which provide that the punishment of deliberate homicide is a permanent abode in hell. This in turn implies that murder is an unpardonable sin, and, as such, there is no room for *kaffārah* in cases of murder. This is the alluded meaning of the second *āyah*; and a conflict arises between this and the inferred meaning of the first *āyah*. The alluded meaning, which is that the murderer is not required to pay a *kaffārah*, takes priority over the inferred meaning that renders him liable to payment.¹³

The Shāfi'is are in disagreement with the Hanafis on the priority of the alluded meaning over the inferred meaning. According to the Shāfi'is, the inferred meaning takes priority over the alluded meaning. The reason given for this is that the former is founded in both the language and rationale of the text whereas the latter is not; that the alluded meaning is only derived from a sign which is basically weaker than the words and the rationale of the text, and that the inferred meaning is a closer meaning and should therefore be given priority over the alluded meaning. It is on the basis of this analysis that, in the foregoing example, the Shāfi'is have given priority to the inferred meaning of the text with the result that the murderer is also required to pay the *kaffārah*.¹⁴

V. Divergent Meaning (*Mafhūm al-Mukhālafah*) and the Shāfi'ī Classification of *al-Dalālāt*

The basic rule to be stated at the outset here is that a legal text never implies its opposite meaning, and that any interpretation that aims at reading a divergent meaning into a given text is unwarranted and untenable. If a legal text is at all capable of imparting a divergent meaning, then there needs to be a separate text to validate it. But any attempt to obtain two divergent meanings from one and the same text is bound to defy the very essence and purpose of interpretation.

This argument has been most forcefully advanced by the Hanafis, who are basically of the view that *mafhūm al-mukhālafah* is not a valid method of interpretation.¹⁵ Having said this, however, *mafhūm al-mukhālafah* is upheld on a restrictive basis not just by the Shāfi'is but also by the Hanafis; they have both laid down certain conditions that must be fulfilled in order to ensure the proper use of this method.

Maḥmūl al-mukhālafah may be defined as a meaning derived from the words of the text in such a way that it diverges from the explicit meaning thereof.¹⁶ To give an example, the Qur'an proclaims the general rule of permissibility (*ibāḥah*) of foodstuffs for human consumption with a few exceptions that are specified in the following text: 'Say, I find nothing in the message that is revealed to me forbidding anyone who wishes to eat except the dead carcass and blood shed forth' (al-An'ām, 6:145).

قُلْ لَا أَحَدٌ فِيمَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ
إِلَّا أَنْ يَكُونَ مَيْتَةً أَوْ دَمًا مَسْفُوحًا

With reference to the latter part of this text, would it be valid to suggest that blood which is not shed forth (*dam ghayr masfūḥ*) is lawful for human consumption? The answer to this question is in the negative, for otherwise the text would be subjected to an interpretation that is most likely to oppose its obvious meaning. As for the permissibility of unspilt blood such as liver and spleen, which consist of clotted blood, this is established not by the *āyah* under consideration but by a separate text. Liver and spleen are lawful to eat by virtue of the *ḥadīth* of the Prophet which proclaims: 'Lawful to us are two types of corpses and two types of blood. These are fish, locust, the liver and the spleen.'¹⁷

أَحَلَّتْ لَنَا مَيْتَانِ وَدَمَانِ : الْمَيْتَانِ السَّمَكُ وَالْجُرَادُ ،
وَالدَّمَانِ الْكَبِدُ وَالطَّحَالُ .

As already indicated, the Shāfi'is have adopted a different approach to *maḥmūl al-mukhālafah*. But to put this matter in its proper perspective, we need to elaborate on the Shāfi'i approach to textual implications (*al-dalālāt*) as a whole, and in the course of this general discussion, we shall turn to *maḥmūl al-mukhālafah* in particular.

Unlike the Hanafi classification of textual implications into four

types, the Shāfi'is have initially divided *al-dalālāt* into the two main varieties of *dalālah al-manṭūq* (pronounced meaning) and *dalālah al-maḥmūl* (implied meaning). Both of these are derived from the words and sentences of the text, the former from the obvious text and the latter come through logical and juridical construction thereof. An example of *dalālah al-manṭūq* is the Qur'anic *āyah* which proclaims that 'God has permitted sale and prohibited usury' (al-Baqarah, 2:275).

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

This text clearly speaks of the legality of sale and the prohibition of usury. *Dalālah al-manṭūq* has in turn been subdivided into two types, namely *dalālah al-iqtidā'* (required meaning), and *dalālah al-ishārah* (alluded meaning). Both of these are either indicated in the words of the text or constitute a necessary and integral part of its meaning. As will be noted, even from this brief description, the difference between the Shāfi'i and Hanafi approaches to the classification of *al-dalālāt* is more formal than real.¹⁸ Abū Zahrah has aptly observed that essentially all of the four Hanafi varieties of *al-dalālāt* are, in one way or another, founded in the actual words and sentences of the text. Despite the technical differences that might exist between the four types of implications, they are basically all founded in the text. In this way all of the four-fold Hanafi divisions of *al-dalālāt* can be classified under *dalālah al-manṭūq*.¹⁹

As the phrase itself indicates, *dalālah al-manṭūq* is concerned not with the direct meaning, but with the implications of spoken words. It is a meaning that is often a logical extension, even a requirement, of the clear text. Note, for example, the following text on the shares of the parents in the estate of their deceased son when the latter has left no other heirs: 'And if he has no son and his parents are his heirs, then his mother is entitled to one third' (al-Nisā', 4:11).

فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلِأُمِّهِ الثَّلَاثُ

The preceding portion of the same *āyah* provides, 'And to each of the parents is a sixth of what he has left if he is survived by a son'. When the two portions of the *āyah* are read together, it is implied that the father's portion in the first of the two situations is two-thirds, a conclusion which is implied in the explicit or spoken (*manṭūq*) portion of the text, even if the text itself is silent on the two-thirds portion for the father.

The Hanafis and Shāfi'is have differed on whether *khul'* divorce is a divorce proper (*ṭalāq*) or a mere annulment (*faskh*) of the marriage contract. The Hanafis say that it is a divorce but the Shāfi'is consider it to be annulment and their conclusions are based on the actual sequence of the words of the text. The implied meaning of the text, or *dalālah al-manṭiq*, has thus been understood differently by the two schools. The text at issue is as follows:

Divorce must be [pronounced] twice; then either keep them [divorced wives] in good fellowship or let them go with kindness. And it is not lawful for you to take any part of what you have given them, unless both fear that they cannot observe the God-ordained limits. Then if you fear that they cannot keep within the limits of God, there is no blame on them for what she gives up to seek her freedom (al-Baqarah, 2:229).

الطلاق مرتان فإمساك بمعروف أو تسريح بإحسان
ولا يحل لكم أن تأخذوا مما عاتبتموهن شيئا إلا أن يخافا
ألا يقيما حدود الله فإن خفتم ألا يقيما حدود الله
فلا جناح عليهما فيما افدت به

The latter part of this text is explicit on the choice that the wife is granted – that she may return the assets or dower she has received – but the text does not specify exactly what the husband should do in return. He must take some action and the Hanafis have answered this question by saying that the *āyah* begins with the word *ṭalāq* and that it is precisely what the husband is supposed to do – hence the conclusion that *khul'* is a variety of *ṭalāq*, not of annulment. The Shāfi'i conclusion that *khul'* is a form of *faskh*, not *ṭalāq*, is based on the sequence of words in this *āyah* and the one that immediately follows. The next *āyah* thus reads: 'So if he divorces her [the third time], she shall not be lawful to him afterwards until she marries another man' (al-Baqarah, 2:230).

فإن طلقها فلا تحل له من بعد حتى تنكح زوجا غيره

The Shāfi'is have argued that the initial *āyah* refers to two *ṭalāq*, then it makes a provision for *khul'* and then the next *āyah* permits a third and final *ṭalāq*. Now if *khul'* were to be a *ṭalāq*, the total numbers of *ṭalāq* would thus become more than three, hence the conclusion,

by way of *dalālah al-manṭiq*, that *khul'* is a form of annulment, not a *ṭalāq*. This is an example of alluded meaning (*dalālah al-ishārah*), whereas the first example concerning the father's share in inheritance was that of *dalālah al-iqtidā'* (required meaning).²⁰ To give yet another example of *dalālah al-iqtidā'*, suppose a person makes a bequest and says: 'I bequeath one thousand dinars to A and B; B's portion is three hundred.' The spoken words, or the clear text, just stops at this point; then the conclusion has to be drawn, by way of *dalālah al-manṭiq*, that A's portion is seven hundred.

Dalālah al-maṣnūm is an implied meaning that is not indicated in the text but is arrived at by inference. This is to a large extent concurrent with what the Hanafis have termed *dalālah al-naṣṣ*. But the Shāfi'is have more to say on *dalālah al-maṣnūm* in that they sub-divide this into the two types of *maṣnūm al-muwāfaqah* (harmonious meaning) and *maṣnūm al-mukhālafah* (divergent meaning). The former is an implicit meaning on which the text may be silent but which is nevertheless in harmony with its pronounced meaning. This harmonious meaning (*maṣnūm al-muwāfaqah*) may be equivalent to the pronounced meaning (*dalālah al-manṭiq*), or it may be superior to it. If it is the former, it is referred to as *lahn al-khiṭāb* (parallel meaning) and, if the latter, it is known as *fahwā al-khiṭāb* (superior meaning). For example, to extend the Qur'anic ruling in *sūra al-Nisā'* (4:10), which only forbids 'devouring the property of orphans' to other forms of mismanagement and waste – is a parallel meaning (*lahn al-khiṭāb*). But to extend the Qur'anic text which forbids the utterance of 'Fie', that is, the slightest word of contempt to, for instance, physical abuse of one's parents, is a meaning which is superior to the pronounced meaning of the text.²¹ The validity of these forms of harmonious meanings is approved by the 'ulamā' of all schools (except the Zāhirīs) who are generally in agreement with the basic concepts of *maṣnūm al-muwāfaqah*. But this is not the case with regard to *maṣnūm al-mukhālafah*, on which the 'ulamā' have disagreed.²²

As noted above, *maṣnūm al-mukhālafah* diverges from the pronounced meaning (*dalālah al-manṭiq*) of the text, which may, however, be either in harmony or in disharmony with it. It is only when *maṣnūm al-mukhālafah* is in harmony with the pronounced meaning of the text that it is accepted as a valid form of interpretation, otherwise it is rejected. For an example of the divergent meaning that is in harmony with the pronounced meaning of the text, we may refer to the *ḥadīth* which states: 'When the water reaches the level of *qullatayn* [approximately two feet], it does not carry dirt.'²³

إذا بلغ الماء قلتين لم يحمل الخبث.

In this way when a polluting substance falls in water of such depth, it is still regarded clean for the purposes of ablution. This is the pronounced, or the explicit, meaning of the text. By way of *mafhūm al-mukhālafah*, it is understood that water below this level is capable of retaining dirt. This is an interpretation deemed to be in harmony with the pronounced meaning of the *ḥadīth*.²⁴

According to the Shāfi'is, deduction by way of *mafhūm al-mukhālafah* is acceptable only if it fulfils certain conditions, which are as follows: firstly, that the divergent meaning does not exceed the scope of the pronounced meaning. For example, the Qur'ānic *āyah* which prohibits saying 'Fie' to one's parents may not be given a divergent meaning so as to make physical abuse of them permissible. Secondly, that the divergent meaning has not been left out in the first place for a reason such as fear or ignorance; for example, if a man orders his servant to 'distribute this charity among the Muslims', but by saying so he had actually intended people in need, whether Muslims or non-Muslims, and yet omitted to mention the latter for fear of being accused of disunity by his fellow Muslims. Should there be evidence of the existence of such a fear, then no divergent meaning should be deduced. A similar case would be when a person says that 'maintenance is obligatory for ascendants and descendants', while he did not know that collaterals are also entitled to maintenance. Should there be evidence of his ignorance on this point, then no divergent meaning should be attempted to the effect, for example, of saying that maintenance is not obligatory for collaterals. Thirdly, that the divergent meaning does not go against that which is dominant and customary in favour of something which is infrequent and rare. To give an example: the Qur'an sates concerning the prohibited degrees of relationship in marriage: 'And forbidden to you are...your step-daughters who live with you, born of your wives with whom you have consummated the marriage; but there is no prohibition if you have not consummated the marriage' (al-Nisā', 4:23).

حرمت عليكم ... وربائبكم اللاتي دخلتم بهن فإن لم
تكونوا دخلتم بهن فلا جناح عليكم

This text is explicit on the point that marriage to a stepdaughter who is under the guardianship of her stepfather is forbidden to the latter. By way of *mafhūm al-mukhālafah*, this *āyah* might be taken to mean that a stepdaughter who does not live in the house of her mother's husband may be lawfully married by the latter. But this would be a meaning which relies on what would be a rare situation. The probable and customary situation in this case would be that the stepdaughter lives with her mother and her stepfather, which is why the Qur'an refers to this qualification, and not because it was meant to legalise marriage with the stepdaughter who did not live with him.²⁵ Fourthly, that the original text is not formulated in response to a particular question or event. For instance, the Prophet was once asked if free-grazing livestock was liable to *zakāh*; and he answered in the affirmative. But this answer does not imply that the stall-fed livestock is not liable to *zakāh*. The answer was originally given to a question which specified the free-grazing livestock and not in order to exempt the stall-fed variety from *zakāh*. Fifthly, that the divergent meaning does not depart from the reality, or the particular state of affairs, which the text is known to have envisaged. For example, the Qur'an states in a reference to relations between Muslims and non-Muslims: 'Let not the believers befriend unbelievers to the exclusion of their fellow believers' (Āl 'Imrān, 3:28).

لا يتخذ المؤمنون الكافرين أولياء من دون المؤمنين

This *āyah* apparently forbids friendship with the unbelievers, but this is not the purpose of the text. It was, in fact, revealed in reference to a particular state of affairs, namely concerning a group of believers who exclusively befriended the unbelievers, and they were forbidden from doing this; it did not mean to impose a ban on friendship with unbelievers. The text, in other words, responded to a particular situation and not the enactment of a general principle, and should therefore not be taken out of context by recourse to *mafhūm al-mukhālafah*.²⁶ Sixthly, that the divergent meaning does not lead to a conclusion that would oppose another textual ruling. To give an example, we refer to the Qur'ānic text on the requirement of retaliation which states: 'Retaliation is prescribed for you in cases of murder: the free for the free, the slave for the slave, the woman for the woman' (al-Baqarah, 2:178).

كتب عليكم القصاص في القتلى الحر بالحر والعبد بالعبد
والأنثى بالأنثى.

This text may not be taken by way of *mafhūm al-mukhālafah* to mean that a man is not retaliated against for murdering a woman. For such a conclusion would violate the explicit ruling of another Qur'anic text which requires retaliation for all intentional homicides on the broadest possible basis of 'life for life' (*al-Mā'idah*, 5:45).

The main restriction that the Hanafīs have imposed on *mafhūm al-mukhālafah* is that it must not be applied to a revealed text, namely the Qur'an and the *Sunnah*. As a method of interpretation, *mafhūm al-mukhālafah* is thus validated only with regard to a non-revealed text. Only in this context, that is in regard to rational proofs and man-made law, can it provide a valid basis of *hukm* and *ijtihād*. The main reason that the Hanafīs have given in support of this view is that the Qur'an itself discourages reliance on *mafhūm al-mukhālafah*, for there are many injunctions in the Qur'an and *Sunnah* whose meaning will be distorted if they were to be given divergent interpretations. To give an example, we read in the Qur'an, in a reference to the number of months that God enacted on the day He created the universe, that there shall be twelve months in a year. The text then continues: 'Four of them are sacred, so avoid committing acts of oppression [*zulm*] therein' (*al-Tawbah*, 9:36).²⁷

منها أربعة حرم ذلك الدين القيم فلا تظلموا فيها

By way of *mafhūm al-mukhālafah*, this text could be taken to mean that acts of oppression are permissible during the rest of the year. This would obviously corrupt the purpose of this text, as oppression is always forbidden regardless of the time in which it is committed.²⁸ Similarly, there is a *hadīth* which instructs the believers that 'none of you may urinate in permanently standing water nor may you take a bath therein to cleanse yourselves of major pollution [*janābah*]'.²⁹

لا يولئ أحدكم في الماء الدائم ولا يغتسلن فيه من الجنابة.

By way of *mafhūm al-mukhālafah*, this text could be taken to mean that taking a bath other than the one specifically for *janābah* is permissible in such water, or that urinating is permissible in flowing water,

neither of which would be correct. Bathing in small ponds below a certain depth is not permitted whether for *janābah* or otherwise.

The Hanafīs have further concluded that whenever necessary, the Qur'an itself has stated the divergent implications of its own rulings and when this is the case, the divergent meaning becomes an integral part of the text and must be implemented accordingly. This style of Qur'anic legislation suggests that if recourse to *mafhūm al-mukhālafah* were generally valid, there would be no need for it to be explicitly spelled out in the Qur'anic text. The Qur'an, in other words, is self-contained and does not leave us to deduce the law from it by recourse to divergent interpretation. Note, for example, the text which instructs the husband to avoid sexual intercourse with his wife during her menstruation. The text then immediately follows on to specify its own divergent implication: 'And approach them not until they are clean. But when they have purified themselves, you may approach them' (*al-Baqarah*, 2:222).

ولا تقرّبوهن حتى يطهرن فإذا تطهرن فأتوهن

In the same *sūra*, there is another text, to which reference has already been made, concerning the prohibition of marriage between the stepdaughter and her stepfather who has consummated the marriage with her mother. The text then continues to specify its divergent meaning by providing that 'there is no prohibition if you have not consummated the marriage' (*al-Nisā'*, 4:23).

فإن لم تكونوا دخلتم بها فلا جناح عليكم

The Hanafīs have thus concluded that *mafhūm al-mukhālafah* is not applicable to the *nuṣūṣ* of the Qur'an and *Sunnah*. We only deduce from the *nuṣūṣ* such rules as are in harmony with their explicit terms.³⁰

The Shāfi'is and the Mālikis who validate the application of *mafhūm al-mukhālafah* to the *nuṣūṣ* have, in addition to the conditions that were earlier stated, imposed further restrictions, which consist of specifying exactly what forms of linguistic expressions are amenable to this method of interpretation. For this purpose the Shāfi'is have subdivided *mafhūm al-mukhālafah* into four types. The main purpose of this classification is to introduce greater accuracy into the use of *mafhūm al-mukhālafah*, specifying that it is an acceptable method of deduction only when it occurs in any of the following forms but not otherwise.

(1) *Mafhūm al-ṣifah* (implication of the attribute). When the ruling

of a text is dependent on the fulfilment of a quality or an attribute then the ruling in question prevails only when that quality is present; otherwise it lapses. This can be shown in the Qur'anic text on the prohibited degrees of relations in marriage which includes 'the wives of your sons proceeding from your loins' (al-Nisā' 4:23).

وحلائل أبنائكم الذين من أصلابكم

The pronounced meaning of this text is the prohibition of the wife of one's own son in marriage. The son has thus been qualified in the text by the phrase 'proceeding from your loins'. By way of *mafhūm al-mukhālafah*, it is concluded from this qualification that the wife of an adopted son, or of a son by fosterage (*raḍā'a*), that is a child who has suckled the breast of one's wife, is not prohibited.³¹

(2) *Mafhūm al-shart* (implication of the condition). When the ruling of a text is contingent on a condition, then the ruling prevails only in the presence of that condition, and otherwise lapses. An example of this is the Qur'anic text on the entitlement to maintenance of divorced women who are observing their waiting period ('*iddah*'). The text proclaims: 'If they are pregnant, then provide them with maintenance until they deliver the child' (al-Talāq, 65:6).

وإن كن أولات حمل فأنفقوا عليهن حتى يرضعن حملهن

The condition here is pregnancy, and the *hukm* applies only when this condition is present. By way of *mafhūm al-mukhālafah*, it is concluded, by those who validate this method at least, that maintenance is not required if the divorced woman, who is finally divorced, is not pregnant. Similarly, the Qur'anic text that provides a concession in regard to fasting is conveyed in conditional terms. Having laid down the duty of fasting, the text then continues: 'But if anyone is ill or travelling, the prescribed fasting should be observed later' (al-Baqarah, 2:185).

ومن كان منكم مريضا أو على سفر فعدة من أيام أخر

By way of *mafhūm al-mukhālafah*, it is concluded that the concession to break the fast does not apply if one is neither ill nor travelling, which is a valid interpretation.³²

(3) *Mafhūm al-ghāyah* (implication of the extent). When the text itself demarcates the extent or scope of the operation of its ruling, the latter will prevail only within the scope of the stated limits and will

lapse when this limit is surpassed. To illustrate this, the Qur'anic text on the time of fasting provides the farthest limit beyond which one must stop eating and drinking during Ramaḍān: 'Eat and drink until you see the white streak of dawn in the horizon distinctly from the black' (al-Baqarah, 2:187).

وكلوا واشربوا حتى يتبين لكم الخط الأبيض من الخط الأسود

By way of *mafhūm al-mukhālafah*, it is concluded that when whiteness appears in the horizon, one may neither eat nor drink.³³

(4) *Mafhūm al-'adad* (implication of the stated number). When the ruling of a text is conveyed in terms of a specified number, the number so stated must be carefully observed. Thus the Qur'anic text on the punishment of adultery is clearly stated to be one hundred lashes (al-Nūr, 24:2). By way of *mafhūm al-mukhālafah* this text is taken to mean that it is not permissible either to increase or decrease the stated number of lashes.³⁴

In conclusion, it may be said that the foregoing methods are generally designed to encourage rational enquiry in the deduction of the *ahkām* from the divinely revealed sources. They provide the jurist and the *muftahid* with guidelines to ensure the propriety of interpretation and *ijtihad*. The restrictions imposed on the liberty of the *muftahid* are obvious enough in that the textual rulings of the Qur'an and *Sunnah* must be treated carefully so that they are not stretched beyond the limits of their correct implications. Yet the main thrust of the guidelines is encouragement of the exercise of rational enquiry in the understanding and implementation of the *nuṣūṣ*. The rules of interpretation that are discussed under this and the preceding chapter are once again indicative of the primacy of revelation over reason, and yet they are, at the same time, an embodiment of the significant role that reason must play side by side with revelation. The two are substantially concurrent and complementary to one another.

NOTES

1. Khallāf, 'Ilm, p. 143; Badrān, *Uṣūl*, p. 417.
2. Khallāf, 'Ilm, p. 145.
3. Badrān, *Uṣūl*, pp. 419-420; Khudārī, *Uṣūl*, p. 119.
4. Abū Zahrah, *Uṣūl*, p. 111; Khudārī, *Uṣūl*, p. 120.
5. Tabrizi, *Mishkāt*, II, 1002, *ḥadīth* no. 3354; Khallāf, 'Ilm, p. 146.

6. Badrān, *Uṣūl*, p. 430.
7. *Ibid.*, p. 411.
8. Abū Zahrah, *Uṣūl*, p. 112.
9. Khallāf, 'Ilm, p. 150.
10. Ibn Mājah, *Sunan*, I, 542, *hadith* no. 1700; Badrān, *Uṣūl*, p. 424.
11. Abū Zahrah, *Uṣūl*, p. 115; Khallāf, 'Ilm, p. 150.
12. Badrān, *Uṣūl*, p. 428.
13. *Ibid.*, p. 429; Khallāf, 'Ilm, p. 153.
14. Abū Zahrah, *Uṣūl*, p. 115.
15. Khallāf, 'Ilm, p. 153.
16. Hitu, *Wajiz*, p. 125.
17. Tabrīzī, *Mishkāt*, II, 1203, *hadith* no. 4132; Khallāf, 'Ilm, p. 154.
18. Badrān, *Uṣūl*, p. 429; Khudārī, *Uṣūl*, pp. 121-122; Hitu, *Wajiz*, p. 120.
19. Abū Zahrah, *Uṣūl*, p. 116.
20. Zuhayrī, *Uṣūl*, p. 420.
21. Hitu, *Wajiz*, p. 124; Ṣāliḥ, *Mabāḥith*, p. 301.
22. Badrān, *Uṣūl*, p. 430.
23. Ibn Mājah, *Sunan*, I, 172, *hadith* no. 518.
24. Zuhayrī, *Uṣūl*, II, 114.
25. Hitu, *Wajiz*, p. 125; Badrān, *Uṣūl*, p. 433.
26. *Ibid.*, p. 126; Badrān, *Uṣūl*, p. 434.
27. These are the months of Muḥarram, Dhū al-Ḥijjah, Dhū al-Qa'dah and Rajab.
28. Badrān, *Uṣūl*, p. 435.
29. Tabrīzī, *Mishkāt*, I, 148; *hadith* no. 474.
30. Abū Zahrah, *Uṣūl*, pp. 117-8.
31. Badrān, *Uṣūl*, p. 432; Ṣāliḥ, *Mabāḥith*, p. 302; Khudārī, *Uṣūl*, p. 123.
32. Hitu, *Wajiz*, p. 127.
33. Khudārī, *Uṣūl*, p. 123.
34. *Ibid.*, p. 123.

CHAPTER SIX

Commands and Prohibitions

The language of the Qur'an (and the *Sunnah*) differs from that of modern statutes in that Qur'anic legislation is not confined to commands and prohibitions and their consequences, but is often coupled with an appeal to the conscience of the individual. This moral appeal may consist of a persuasion or a warning, an allusion to the possible benefit or harm that may accrue from observing or violating an injunction, or a promise of reward/punishment in the Hereafter. Modern laws are often devoid of such appeals, as they are usually confined to an exposition of imperative rules and their tangible results.¹

Commands and prohibitions in the Qur'an occur in a variety of forms. While an injunction is normally expected to be in the imperative mood, there are occasions when a simple past is used as a substitute. For example, the injunctions that 'retaliation is prescribed for you in cases of murder'

كتب عليكم القصاص في القتلى

and that 'fasting is prescribed for you' (al-Baqarah, 2:178 and 183)

كتب عليكم الصيام

are both expressed in the past tense. Injunctions are also conveyed in the present participle (*muḍāri*). For example, the command that 'anyone who sees the month [or is present at the month] shall fast therein [*falyasumhu*]' (al-Baqarah, 2:185); and also the text which reads: 'And mothers shall suckle [*yurḍi'na*] their children for two whole years [that

is] for one who desires to complete the time of suckling' (al-Baqarah, 2:233).

والوالدات يرضعن أولادهن حولين كاملين لمن أراد أن يتم
الرضاعة

Similarly, a Qur'anic injunction may occur in the form of a moral condemnation of a certain form of conduct, such as the rule on the sanctity of private dwellings which provides: 'It is no virtue to enter houses from the back' (al-Baqarah, 2:189).²

وليس البر بأن تأتوا البيوت من ظهورها

Also, a Qur'anic command or prohibition may be conveyed in the form of an allusion to the consequences of a form of conduct, such as a promise of reward or punishment in the hereafter. For example, after expounding the rules of inheritance in *sūra al-Nisā'* (4:13-14) the text goes on to promise to those who observe them a reward, and warns violators of a punishment, in the hereafter.

I. Commands

A command proper (*amr*) is defined as a verbal demand to do something issued from a position of superiority over those inferior.³ Command in this sense differs from both supplication (*du'ā'*) and request (*iltimās*) in that the former is a demand from an inferior to one who is superior, whereas a request is a demand among people of equal or near-equal status. Since a verbal command can mean different things, namely an obligatory order, a mere recommendation, or even permissibility, the *'ulamā'* have differed as to which of these is the primary and which the secondary meaning of a command. Some have held the view that *amr* is in the nature of a homonym (*mushtaraka*) which imparts all of these meanings. Others have held that *amr* partakes of only two of these concepts, namely obligation and recommendation, but not permissibility. Still others have held that *amr* implies a permission to do something and that this is the widest meaning of *amr*, which is common to all three of the foregoing concepts.⁴

According to the majority opinion, however, a command by itself, that is, when it is not attended by clues or circumstances that might give it a particular meaning, implies obligation or an emphatic demand

only. But this may change in the event of other indications being present, which might reduce a command to permissibility, recommendation, or indeed to a variety of other meanings. Thus when we read in the Qur'an commands such as *kulū wa-shrabū* ('eat and drink') (al-A'raf, 7:31), the indications are that they amount to no more than permissibility (*ibāḥah*); for eating and drinking are the necessities of human life, and a command in respect of them must logically amount to permissibility only. Similarly, the Qur'anic permission in respect of hunting after the completion of the *hajj* ceremonies given in *sūra al-Mā'idah* (5:2) and its address to the believers to 'scatter in the land' (*fa'ntashirū fī'l-ard*) after performing the Friday prayers (al-Jumu'ah, 62:10) are both in the imperative form. But in both cases the purpose is to render these activities permissible only.⁵

A command may likewise convey a recommendation if there are indications to warrant this conclusion. This is, for example, the case with regard to the Qur'anic command that requires the documentation of loans: 'When you give or take a loan for a fixed period, write it down' (al-Baqarah, 2:282).

إذا تدايتمت يدين إلى أجل مسمى فاكتبوه

However, from an indication which occurs in the next *āyah* in the same *sūra*, it is concluded that the command here implies a recommendation (*nadb*) only. This *āyah* reads: 'And if one of you deposit a thing on trust, let the trustee [faithfully] discharge his trust' (al-Baqarah, 2:283).

فإن أمن بعضكم بعضا فليؤد الذي أؤتمن أمانته

Here the use of the word 'trust' (*amānah*) signifies that the creditor may trust the debtor even without any writing.⁶ The majority of *'ulamā'* have held the same view regarding the requirement of witnesses in commercial contracts, which is the subject of another Qur'anic command occurring in the same passage, known as the *āyah al-mudāyanah* (2:282): 'Whenever you enter a contract of sale, let it be witnessed and let neither the scribe nor the witness suffer harm.'

وأشهدوا إذا تباعتم ولا يضار كاتب ولا شهيد

The *Zāhiri 'ulamā'* have upheld the obvious meaning of these provisions and have made documentation a requirement of every loan, or

any form of deferred payment, and have made witnesses a requirement of every contract of sale. This, in their view, is more conducive to the fulfilment of contracts and the prevention of disputes among people.⁷

A command may, according to the indications provided by the context and circumstances, imply a threat, such as the Qur'ānic address to the unbelievers: 'Do what you wish' (Fuṣṣilat, 41:40)

اعملوا ما شئتم

and to the devil: 'Lead to destruction those that you can' (Banī Isrā'īl, 17:64).

واستغفر من استطعت

A command may similarly imply contempt (*ihānah*), such as the Qur'ānic address to the unbelievers on the Day of Judgement: 'Taste [the torture], you mighty and honourable!' A command may sometimes imply supplication when someone says, for example, 'O Lord grant me forgiveness', and indeed a host of other meanings which may be understood in the light of the context and surrounding circumstances.⁸ As already noted, the majority of 'ulamā' have held that a command normally conveys an obligation unless there are indications to suggest otherwise.

The Lawgiver may at times order something which has hitherto been prohibited. The question then arises as to the nature of a command which follows a prohibition (*al-amr ba'd al-hazar*); does it convey an obligation or mere permissibility? The majority of 'ulamā' have held the view that a command following a prohibition means permissibility, not obligation. Two examples of such a command in the Qur'ān have already been given above in the context of the permission to hunt following its prohibition during the *hajj* ceremonies and the permission to conduct trade following its prohibition at the time of the Friday prayers (al-Mā'idah, 5:2; and al-Jumu'ah, 62:10 respectively).⁹ An example of such a command in the *Sunnah* is the *hadīth* in which the Prophet is reported to have said: 'I had forbidden you from visiting graves. Nay, visit them, for it reminds you of the hereafter.'¹⁰

كنت لهيئكم عن زيارة القبور ألا فزوروها فإنها
تذكركم بالآخرة.

The Hanafis have taken the view that a command following a prohibition conveys an obligation, which is the primary meaning of a command and that this basic meaning remains unaffected by what might have preceded it. The basic evidence that establishes something as *uṭṭah* does not distinguish between an *amr* that is preceded by a prohibition or is not preceded by one. Some Hanbali 'ulamā', and also the Hanafi scholar Kamāl ibn al-Humām, have held that a command following a prohibition removes the prohibition and the matter is consequently restored to its original state, that is, the state in which it was prior to the prohibition. Zaydan has considered this to be the most appropriate view.¹¹

The next question that arises in this connection is whether a command requires a single compliance or repetition. According to the majority view, this question can only be determined in the light of indications which might specify that repeated performance is required. However, in the absence of such indications, a single instance of performance is the minimum requirement of a command. Among the indications that determine repetition is when a command is issued in conditional terms. For example, the Qur'ānic provision 'if you are impure then clean yourselves' (al-Mā'idah, 5:6)

وإن كنتم جنباً فاطهروا

or the text that states: 'The adulterer and adulteress, flog them each one hundred lashes'

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

that is, if they commit adultery (al-Nūr, 24:2). Since the command to take a bath in the first *ḍayāh* is conditional on *janābah*, that is, on sexual intercourse, then a bath must be taken following every instance of sexual intercourse. Similarly, when a command is dependent on a cause or an attribute, then it must be fulfilled whenever the cause or the attribute is present. The Qur'ānic command, for example, that reads: 'Perform the *ṣalāh* at the decline of the sun' (Banī Isrā'īl, 17:18)

أقم الصلاة لدلوك الشمس

requires repeated performance at every instance when the cause for it is present, that is, when the specified time of *ṣalāh* arrives.¹²

Some Shāfi'is scholars and the majority of Hanbalis are of the view

that a command requires sustained repetition throughout the lifetime of its audience unless there is evidence to suggest otherwise. A reference is made, in support of this view, to the incident when the Prophet addressed the people and said that 'God has prescribed the *ḥajj* as a duty upon you.' A man then asked the question 'Is it every year, O Messenger of God?' To this the Prophet replied 'If I said it, it would have been so...*Ḥajj* is required only once and more than that is supererogatory.' From this argument it has been advanced that the man who asked the question evidently knew the Arabic language and if a command did not require repetition he would not have asked the question in the first place. This is, however, considered to be a rather weak argument, for it is possible to say just the opposite in that if a command had conveyed a repetition as a matter of linguistic certainty, the man would have not raised any question about it. The episode thus remains inconclusive on the subject of repetition.¹³

As for the question of whether a command requires immediate or delayed performance, it is once again observed that the command itself merely consists of a demand, and the manner of its performance must be determined in the light of indications and surrounding circumstances. When, for example, A tells B to 'do such and such now', or alternatively orders him to 'do such and such tomorrow', both orders are valid and there is no contradiction. However, if a command were to require immediate execution then the word 'now' in the first order would be superfluous just as the word 'tomorrow' in the second order would be contradictory. When a person commands another to 'bring me some water' while he is thirsty, then by virtue of this indication, the command requires immediate performance just as the order to 'collect the rent' when it is given, say, in the middle of the month while the rent is collected at the end of each month, must mean delayed performance.

Thus it is obvious that the commandant may specify a particular time in which the command must be executed. The time limit may be strict or it may be flexible. If it is flexible, like the command to perform the obligatory *ṣalāh*, then performance may be delayed until the last segment of the prescribed time. But if the command itself specifies no time limit, such as the order to perform an expiation (*kaffārah*), then execution may be delayed indefinitely within the expected limits of one's lifetime. However, given the uncertainty of the time of one's death, an early performance is recommended in regard to *kaffārah*.¹⁴

And lastly, the question arises as to whether a command to do

something implies the prohibition of its opposite. According to the majority view, a command to do something does imply the prohibition of its opposite, regardless of whether the opposite in question consists of a single act or of a plurality of acts. Thus when a person is ordered to move, he is in the meantime forbidden to remain still; or when a person is ordered to stand, he is forbidden from doing any of a number of opposing acts, such as sitting, crouching, lying down, etc. However, some '*ulamā*', including al-Juwaynī, al-Ghazālī, Ibn al-Hājjib and the Mu'tazilah, have held that a command does not imply the prohibition of its opposite. A group of the Ḥanafī and Shāfi'ī '*ulamā*' have held that only one of the several opposing acts, whether known or unknown, is prohibited, but not all.¹⁵ There are those who maintain that the exact opposite of a command has to be determined by looking at the command itself. If the command conveys an obligation (*uṣūb*), then its opposite would be a prohibition (*tahrim*), but it would be an abomination (*karāhiyyah*) if the command only conveyed a recommendation (*nadb*) in the first place. According to yet another view, the ruling here is confined to the imperative command, thereby excluding commands that only convey recommendation. The other limb of this equation is also generally upheld in that a prohibition not to do something conveys in the meantime a command in respect of doing the same. Thus the Qur'ānic *āyah* (al-Baqarah, 2:228) concerning divorced women that 'it is not lawful for them to conceal what God has created in their wombs'

ولا يَحِلُّ لهنَّ أَنْ يَكْمُنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ

conveys in the meantime a command that they should reveal the facts of their pregnancy. Similarly, when we read in the Qur'an the command 'tell the believers to lower their gaze' when encountering members of the opposite sex, it conveys in the meantime a prohibition in respect of the lascivious gaze. The result of such differences would obviously have a bearing on whether the person who commits the opposite of a command must be penalised and, if so, to what extent. Specific answers to such questions can only be determined in the light of the surrounding circumstances and the state of mind of the individual concerned, as well as the general objectives of the law that can be ascertained in a given command.

II. Prohibitions

Prohibition (*nahy*), being the opposite of a command, is defined as a word or words which demand the avoidance of doing something addressed from a position of superiority to one who is inferior.¹⁶ The typical form of a prohibitory order in Arabic is that of a negative command beginning with *lā* such as *lā taf'al* (do not), or the Qur'ānic prohibition which reads 'Slay not the life which God has made sacred' (al-An'ām, 6:151).

ولا تقتلوا النفس التي حرم الله إلا بالحق

A prohibition may be expounded in a statement (*jumlaḥ khabariyyah*) such as occurs, for example, in the Qur'an (al-Mā'idah, 5:3): 'Prohibited to you are the flesh of dead corpses and blood'

حُرِّمَتْ عَلَيْكُمْ الْمَيْتَةُ وَالْدَّمُ

or in the form of a present participle, such as God 'forbids immorality and evil' (al-Naḥl, 16:90).

ويَنْهَى عَنْ الْفَحْشَاءِ وَالْمُنْكَرِ

A prohibition is also conveyed by denial of permissibility (*nafy al-hal*) such as in the following text: 'When he divorces her [three times] she is no longer lawful for him unless she marries another man' (al-Baqarah, 2:230).

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدِ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ

A prohibition may sometimes occur in the form of a command which requires the avoidance of something, such as the Qur'ānic phrase *wa dhanū al-bay'* ('abandon sale', that is during the time of Friday *ṣalāh*) in sūra al-Jumu'ah (62:9), or *uājitanibū qawḥ al-zūr* ('avoid lying') in sūra al-Ḥajj (22:30), or may occur in a variety of other forms that are found in the Qur'an.

A prohibition, like a command, may convey a variety of meanings. Although the primary meaning of *nahy* is illegality, or *tahrim*, *nahy* is also used to imply mere reprehension (*karāhiyyah*), or guidance (*irshād*), or reprimand (*ta'dīb*), or supplication (*du'ā*). An example of *nahy* which implies reprehension is the Qur'ānic *āyah* addressing the

believers to 'prohibit not [*lā tuḥarimū*] the good things that God has made lawful to you' (al-Mā'idah, 5:87).

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَحْرَمُوا طَيِّبَاتِ مَا أَحَلَّ اللَّهُ لَكُمْ

Nahy which conveys moral guidance may be illustrated by the Qur'ānic *āyah* addressing the believers to 'ask not questions about things which, if made plain to you, may cause you trouble' (al-Mā'idah, 5:101).

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَسْأَلُوا عَنْ أَشْيَاءَ إِنْ تُبَدَّ لَكُمْ تَسْؤُكُمْ

An example of *nahy* which implies a threat is when a master tells his recalcitrant servant: 'Don't follow what I say and you will see.' An example of *nahy* which conveys supplication in the Qur'an occurs in sūra al-Baqarah (2:286) which reads: 'Our Lord, condemn us not if we forget or make a mistake.'

رَبَّنَا لَا تَاْخُذْنَا إِنْ نَسِينَا أَوْ أَغْطَيْنَا

Since *nahy* can convey several meanings, the 'ulamā have differed as to which of these is its primary (*ḥaqīqī*) as opposed to secondary or metaphorical meanings. Some have held that illegality (*tahrim*) is the primary meaning of *nahy* while others consider reprehension (*karāhiyyah*) to be the original meaning of *nahy*. According to yet another view, *nahy* is a homonym in respect of both. The majority (*jumhūr*) of 'ulamā have held the view that *nahy* primarily implies *tahrim*, a meaning which will be presumed to prevail unless there are indications to suggest otherwise. An example of *nahy* in the Qur'an that has retained its primary meaning is the phrase '*lā taqtulū*' in the *āyah* which states 'Slay not life which God has made sacred' (al-An'ām, 6:151).

ولا تقتلوا النفس التي حرم الله

There is no indication in this text to warrant a departure from the primary meaning of *lā taqtulū*, which must therefore prevail. The primary meaning of *nahy* may be abandoned for a figurative meaning if there is an indication to justify this. Hence the phrase '*lā tu'ākhidhnā*' ('condemn us not') implies supplication, as the demand here is addressed to Almighty God, and is hence a demand from a position

of inferiority, which indicates that the correct meaning of *nahy* in this context is supplication, or *du'ā'*.¹⁷

III. The Value of Legal Injunctions

The object of a prohibition may be to prevent an act such as adultery (*zinā*), or it may be to prevent the utterance of words such as those purporting to effect the sale of dead corpses, or of a freeman, by means of offer and acceptance. In either case, the prohibition does not produce any rights or legal effects whatsoever. Hence no right of paternity is established through *zinā*; on the contrary the perpetrator is liable to punishment. Similarly, no contract is concluded and no right of ownership is proven as a result of the sale of a corpse.

If the object of prohibition is an act, and it is prohibited owing to an extraneous attribute rather than the essence of the act itself, such as fasting on the day of 'īd, then the act is null and void (*bāṭil*) according to the Shāfi'is but is irregular (*fāsid*) according to the Hanafis. The act, in other words, can produce no legal result according to the Shāfi'is, but does create legal consequences according to the Hanafis, although it is basically sinful. The Hanafis consider such acts to be defective and must be dissolved by means of annulment (*faskh*), or rectified if possible. If the prohibition consists of words such as concluding a contract of sale which partakes of usury, it is still *bāṭil* according to the Shāfi'is but *fāsid* according to the Hanafis, which means that it should either be revoked or amended to the extent that it is purified of its usurious content.

The position is, however, different with regard to devotional matters (*'ibādāt*) whose purpose is seeking the pleasure of God. The *fāsid* in this context is equivalent to *bāṭil*. Hence there is no merit to be gained by fasting on the day of 'īd, nor will it be taken into account in compensation to the fasting owed by the *mukallaf*.

With regard to *mu'āmalāt*, if the prohibition is due to an external factor, such as a sale concluded at the time of the Friday prayer, the majority maintains that all the legal consequences will follow from the prohibited act, although the perpetrator will have incurred a sin. Thus the sale so concluded will prove the right of ownership, which is however, deficient and should be rescinded at an early opportunity.¹⁸ Further detail on the *fāsid* and *bāṭil* can be found in our discussion of the *ahkām*, which is the subject of a separate chapter.

As for the question of whether a prohibition requires both immediate as well as repeated compliance, the '*ulamā'*' are generally

in agreement that it does and that this is the only way a prohibition can be observed. Unless the object of a prohibition is avoided at all times, the prohibition is basically not observed. It is therefore necessary to avoid the prohibited act as from the moment it is issued and whenever it is applicable. This is the case with regard to prohibitions that are not qualified in any way, such as the Qur'anic text concerning the property of orphans which states: 'Do not approach the property of the orphan except in the way that is best' (al-An'am, 6:151).

ولا تقربوا مال اليتيم إلا بالتي هي أحسن

However, if a prohibition is qualified by a condition that overrules immediate compliance, then it has to be observed within the meaning of that condition. An example of this occurs in the Qur'an (al-Mumtahinah, 60:10) which reads, in an address to the believers: 'When there come to you believing women refugees, examine [and test] them. If you find that they are believers, then send them not back to the unbelievers. God knows best as to their faith.'

يأيتها الذين آمنوا إذا جاءكم المؤمنات مهاجرات فامتحنوهن

فإن علمتموهن مؤمنات فلا ترجعهن إلى الكفار .

الله أعلم بالماخيات

In this *āyah*, the prohibition (not to send them back) is conditional upon finding that they are believers, and until then the prohibition must remain in abeyance.¹⁹ There is a difference between a command and a prohibition in that the purpose of the former is to create something or to establish the existence of something, and this is realised by a single instance of execution, and there is basically no need for repetition. A prohibition, on the other hand, aims at the absence of something, and this cannot be realised unless it is absent all the time. A single instance of absence is thus not enough to fulfil the purpose of a prohibition.²⁰

As already stated, a command that succeeds a prohibition conveys permissibility only. The position is once again different with regard to a prohibition: whenever a prohibition succeeds a command, it conveys illegality or *tahrim*, not mere permissibility.²¹

Injunctions, whether occurring in the Qur'an or the *Sunnah*, are of

two types: explicit (*ṣarīh*) and implicit (*ghayr ṣarīh*). Explicit commands and prohibitions require total obedience without any allowance for individual circumstances and regardless of whether they are found to be rational or not, for it is in the essence of devotion (*'ibādah*) that obedience does not depend on the rationality or otherwise of an injunction. The question arises as to whether one should adopt a literal approach to the enforcement of commands and prohibitions, or allow considerations of rationality and *māslahah* to play a part in the manner of their implementation. For example, the *ḥadīth* which provides that the owners of livestock must give 'one in forty sheep' in *zakah*:²² should this provision be followed literally, or could we say that the equivalent price of one or many sheep could also be given in *zakah*? Similarly, when the Qur'ān enjoins the Muslims concerning attendance at the Friday congregational prayers to 'rush to the remembrance of God and abandon sale' (al-Jumu'ah, 62:9),

فاسعوا إلى ذكر الله وذروا البيع

should the word rush (*fas'awu*) be taken literally or in the sense of an emphasis on diligence at attending the Friday prayers? A similar question can be raised with regard to the second part of the same *āyah* which commands the Muslims to 'abandon sale' (*wa dhari'l-bay'*). Should this be taken to imply that a sale that has occurred at the specified time is actually unlawful and void, or should it once again be taken as an order that requires perseverance and consistent observance? Should one follow the main objective of the Lawgiver or the literal requirements of the text which convey a command or a prohibition? These are but some of the questions that are asked concerning the correct understanding of Qur'ānic injunctions.²³

The implicit injunctions are also divided into two types. The first of these is when a ruling of the Qur'ān is conveyed in implicit terms but has been substantiated by the explicit terms of the *ḥadīth*, in which case it becomes equivalent to an explicit ruling.²⁴ The second type of implicit injunction is when a ruling of the Qur'ān occurs, not in the form of a command or a prohibition, but as praise or condemnation of certain conduct. The precise import of such provisions cannot always be ascertained in respect of whether they convey an injunction or mere warning or recommendation as the case may be. Note, for example, the text which reads that God 'does not love the prodigals' (al-A'rāf, 7:31).

إنه لا يحب المرففين

The text of this *āyah* does not indicate the precise legal or religious enormity of extravagance, and it cannot be ascertained whether extravagance is prohibited or merely disapproved of.

Another question that merits attention in the study of commands and prohibitions is related to the means that lead to the performance of a command, or the avoidance of a prohibition. The question is whether the means should also be covered by the rules that regulate their ends. Briefly, the answer to this question is in the affirmative. The means that lead to the observance of commands and prohibitions are covered by the same ruling which applies to the command/prohibition in the first place.²⁵ This is indicated by the legal maxim 'What is essential for the completion of a *wājib* itself becomes a *wājib*'. We may here refer to two different situations, one of which is that the means to a *wājib* may be the subject matter of a separate command, in which case the matter would fall outside the scope of our discussion, for in that case the means and the ends are each regulated by their own rules. An example of this is ablution (*wuḍū'*) which is complementary to *ṣalāh* but is regulated under a separate command; and, secondly, when the means on which a *wājib* depends is not the subject of separate ruling. This is our main area of concern here and the '*ulamā'* have generally held that the means here becomes a *wājib* under the same command that governs the end. Thus, if performing the *hajj* necessitates travelling to Mecca, then this activity is also covered by the initial command and becomes an integral part of it. Similarly, if the Qur'ānic command concerning consultation (Al-Imrān, 3:159) cannot be implemented without creating a consultative assembly, then this too becomes a requirement for the same command. We may thus conclude by saying that the means to a *wājib* becomes a part of that *wājib* if the means in question is not the subject of a separate command.

A *muftahid* who deduces the law from a given text must be adequately familiar with the language of the Qur'ān, and must know that the *ahkām* are not only expressed in the imperative but that a praise or a promise of reward may in effect be equivalent to a command. Similarly, a mere denunciation, a threat of punishment in the Hereafter, or a reference to the adverse consequences of a form of conduct, may be equivalent to a prohibition.²⁶ The distinction as to whether a command in the Qur'ān conveys an obligation (*wājib*),

a recommendation (*nadb*) or mere permissibility (*ibāḥah*) must be determined in the light of the objectives of the *Sharī'ah* as well as by looking at the meaning of the words of the Qur'ān. To determine the value (*hukm*) of a command, attention is paid not only to the grammatical form of the words in which it is conveyed, but also to the general objectives of the law. This is equally true of a prohibitory text. To determine whether a prohibition conveys actual *tahrim* or mere reprehension (*karāḥah*) is not always easily understood from the words of the *nuṣūṣ*. Only a portion of the *nuṣūṣ* convey a precise meaning by virtue of the clarity of their language. In Shāṭibi's estimation, a much larger portion of the *nuṣūṣ* of the Qur'ān cannot be determined by reference to the linguistic forms in which they are expressed only. The *mujtahid* must therefore be fully informed of the general principles and objectives of the *Sharī'ah* so as to be able to determine the precise values of the *nuṣūṣ* and the commands or prohibitions they contain.²⁷

NOTES

1. Shāṭibi, *Idām*, p. 499.
2. This is one of the several *āyāt* which occur in the Qur'ān concerning the privacy of one's home.
3. Badrān, *Uṣūl*, p. 360.
4. Ibid., p. 361; Shawkānī, *Inḥād*, p. 91.
5. Cf. Shāṭibi, *Muwāfaqāt*, III, 88.
6. Khallāf, *Ilm*, p. 111.
7. Abū Zahrah, *Uṣūl*, p. 75; Badrān, *Uṣūl*, p. 362.
8. Badrān, *Uṣūl*, pp. 361-2; Hitu, *Wajiz*, pp. 134-8.
9. Badrān, *Uṣūl*, p. 363; Hitu, *Wajiz*, p. 141.
10. Ghazālī, *Mustaḥḍā*, I, 83; Āmidī, *Iḥkām*, IV, 211; Tabrizi, *Muskhāt*, I, 554, *ḥadīth* no. 1769.
11. Zaydān, *Wajiz*, p. 289.
12. Shawkānī, *Inḥād*, pp. 98-9; Badrān, *Uṣūl*, p. 364.
13. Ibn Hazm, *Iḥkām*, III, 294; Shawkānī, *Inḥād*, p. 8.
14. Shawkānī, *Inḥād*, pp. 99-100; Badrān, *Uṣūl*, pp. 365-6.
15. Shawkānī, *Inḥād*, pp. 101-102.
16. Badrān, *Uṣūl*, p. 366.
17. Shawkānī, *Inḥād*, pp. 109-110; Badrān, *Uṣūl*, pp. 366-368; Hitu, *Wajiz*, p. 150.
18. Shawkānī, *Inḥād*, p. 110; Badrān, *Uṣūl*, p. 369.
19. Badrān, *Uṣūl*, p. 370.
20. Hitu, *Wajiz*, p. 151.
21. Ibid.

22. Abū Dāwūd, *Sunan*, II, 410, *ḥadīth* no. 1567; Ghazālī, *Mustaḥḍā*, I, 159.

23. For a detailed treatment of commands and prohibitions see Shāṭibi, *Muwāfaqāt*, III, 90-140.

24. Ibid., III, 92.

25. Ibid., III, 93.

26. Abū Zahrah, *Uṣūl*, p. 72.

27. Shāṭibi, *Muwāfaqāt*, III, 90.

CHAPTER SEVEN

Naskh (Abrogation)

Literally, *naskh* means 'obliteration', such as in *nasakhat al-rīḥ athar al-masby*, meaning 'the wind obliterated the footprint'. *Naskh* also means transcription or transfer (*al-naql wa al-tahwīl*) of something from one state to another while its essence remains unchanged. In this sense, *naskh* has been used in the Qur'ānic āyah which reads: 'innā kunnā nastansikhū mā kuntum tā'malūn', that is, 'Verily We write all that you do' (al-Jāthiyah, 45:29). This usage of *naskh* can also be seen in the familiar Arabic expressions *tanāsukh al-arwāḥ* (reincarnation) and *tanāsukh al-mawārith* (the transfer of inheritance from persons to persons). The 'ulamā' have differed as to which of these two meanings of *naskh* is the literal (*ḥaqīqī*) as opposed to that which might be metaphorical (*majāzī*). Some 'ulamā', including Abū Bakr al-Bāqillānī and al-Ghazālī, have held that '*naskh*' is a homonym and applies equally to either of its two meanings. According to the majority view, however, obliteration (*al-raḥ' wa al-izālah*) is the primary, and transcription or transfer is the secondary meaning of *naskh*.¹

Naskh may be defined as the suspension or replacement of one *Sharī'ah* ruling by another, provided that the latter is of a subsequent origin, and that the two rulings are enacted separately from one another. According to this definition, *naskh* operates with regard to the rules of *Sharī'ah* only, a proviso which precludes the application of *naskh* to rules that are founded in rationality ('aql) alone. The *ḥukm*, or ruling, in this definition not only includes commands and prohibitions but also the three intermediate categories of recommended, reprehensible and *mubāḥ*. The requirement that the two rulings must be separate means that each must be enacted in a separate text, for

when they both occur in one and the same passage, it is likely that one complements or qualifies the other, or that one may embody a condition or an exception to the other.²

Abrogation applies almost exclusively to the Qur'ān and the *Sunnah*; its application to *ijmā'* and *qiyās*, as will later be explained, has been generally overruled. And even then, the application of *naskh* to the Qur'ān and *Sunnah* is confined, in terms of time, to one period only, which is the lifetime of the Prophet. There is, in other words, no *naskh* after the demise of the Prophet. But during his lifetime, there were instances when some of the rulings of the Qur'ān and *Sunnah* were either totally or partially repealed by subsequent rulings. This was due mainly to the change of circumstances in the life of the community and the fact that the revelation of the Qur'ān spanned a period of twenty-three years. The 'ulamā' are unanimous on the occurrence of *naskh* in the *Sunnah*. It is, however, with regard to the occurrence of *naskh* in the Qur'ān on which there is some disagreement, both in principle and on the number of instances in which *naskh* is said to have occurred in the Qur'ān.³

Abrogation is, by and large, a Medinan phenomenon which occurred as a result of the changes that the Muslim community encountered following the Prophet's migration to Medina. Certain rules were introduced, at the early stage of the advent of Islam, that were designed to win over the hearts of the people. An example of this is the number of daily prayers which was initially fixed at two but was later increased to five. Similarly, *mu'ah*, or temporary marriage, was initially permitted but was subsequently prohibited when the Prophet migrated to Medina.⁴ These and similar changes were effected in the *nuṣūṣ* at a time when the Muslim community acquired sovereign authority, and fresh legislation was deemed necessary to regulate its life in the new environment of Medina. The basic philosophy of *naskh* is thus generally acknowledged to be a realisation of benefit for the people, which ensured harmony between the law and the prevailing conditions of society.

Some Ḥanafī and Mu'tazilī scholars have held the view that *ijmā'* can abrogate a ruling of the Qur'ān or the *Sunnah*. The proponents of this view have claimed that it was due to *ijmā'* that 'Umar ibn al-Khaṭṭāb discontinued the share of the *mu'allafah al-qulūb* in the *zakāh*. These were persons of influence whose friendship and co-operation was deemed to be beneficial to Islam.⁵ The Qur'ān assigned them a share in *zakāh* (al-Tawbah, 9:60), but this was discontinued apparently because the *mujtahidūn* of the time reached a unanimous

agreement to that effect. The correct view, however, is that owing to differences of opinion that are recorded on this matter, no *ijmā'* could be claimed to have materialised.⁶ Besides, the majority of 'ulamā' have held that *ijmā'* neither abrogates nor can be abrogated itself; and at any rate *ijmā'* cannot abrogate a *naṣṣ* of the Qur'ān or the *Sunnah*, for a valid *ijmā'* may never be concluded in contradiction to the Qur'ān or the *Sunnah* in the first place. Al-Āmidī elaborates this as follows: the *ḥukm* which the *ijmā'* seeks to repeal might be founded in a *naṣṣ*, another *ijmā'* or *qiyās*. The first is not possible, for the *ijmā'* which seeks to abrogate the *naṣṣ* of Qur'ān or *Sunnah* is either based on an indication (*dalīl*) or not. If it is not based on any *dalīl*, then it is likely to be erroneous, and if it is based on a *dalīl* this could either be a *naṣṣ* or *qiyās*. If the basis (*sanad*) of *ijmā'* is a *qiyās*, then abrogation is not permissible (as *qiyās* must not violate *ijmā'*); and if the *sanad* of *ijmā'* is a *naṣṣ*, then abrogation is by that *naṣṣ*, not by *ijmā'*. Moreover, a ruling of *ijmā'* cannot be abrogated by the Qur'ān or *Sunnah* simply because the Qur'ān and *Sunnah* precede *ijmā'* and the abrogator (*al-nāsikh*) must in all cases precede the abrogated (*al-mansūkh*). The Mu'tazili scholars and also the Hanafi scholar 'Isa ibn Abān, have, on the other hand, held that *ijmā'* may abrogate the *naṣṣ* and give as an example the Qur'ānic text on the share of mu'allafah al-qulūb which was abrogated by the *ijmā'* of the Companions. The *jumhūr* have replied that this was a case not of abrogation, but of the termination of a *ḥukm* because of the termination of its 'illah. This is explained further by the fact that the share of the mu'allafah al-qulūb was discontinued by 'Umar ibn al-Khaṭṭāb on grounds of Sharī'ah-oriented policy (*al-siyāsah al-shar'iyyah*), which is explained in the caliph's widely quoted phrase that 'God has exalted Islam, and it is no longer in need of their favour.'⁷

According to the general rule, a Qur'ānic *naṣṣ* or a *mutāwātir ḥadīth* cannot be abrogated by a weaker *ḥadīth*, by *ijmā'* or by *qiyās*. For they are not of equal authority to the *naṣṣ*. This is, in fact, the main argument in support of the rule, already referred to, that no abrogation of the *naṣṣ* is possible after the demise of the Prophet, for the Qur'ān and the *Sunnah* ceased to be revealed with his demise. Since nothing weaker than the Qur'ān and *Sunnah* can abrogate anything in either of these sources, abrogation, to all intents and purposes, came to an end with the death of the Prophet. *Ijmā'*, *qiyās* and *ijtihād*, being weaker in comparison to the *nuṣṣ*, cannot abrogate the rules of divine revelation.⁸

It is in view of these and similar considerations that the 'ulamā'

have arrived at the general rule that *ijmā'* can neither abrogate nor be abrogated itself. Abrogation in other words is generally not relevant to *ijmā'*. The preferable view, however, is that *ijmā'* cannot abrogate the rulings of the Qur'ān, the *Sunnah* or of another *ijmā'* that is founded in the Qur'ān, *Sunnah* or *qiyās*. However, a subsequent *ijmā'* may abrogate an existing *ijmā'* in consideration of public interest (*māṣlahah mursalah*) or custom ('urf). This would in theory appear to be the only situation in which *ijmā'* could operate as an abrogator.⁹

And finally, since the principal function of *qiyās* is to extend the rulings of the Qur'ān and *Sunnah* to similar cases, it can never operate in the opposite direction, namely, to repeal a text of the Qur'ān or *Sunnah*. Broadly speaking, *qiyās* has no place in the theory of *naskh*: *qiyās* cannot be an abrogator, basically because it is weaker than the *naṣṣ* and *ijmā'* and thus cannot abrogate either. Nor can *qiyās* itself be abrogated, for *qiyās* is normally based on a textual ruling and is bound to remain valid for as long as the original text remains valid. It is thus inconceivable that a *qiyās* could be abrogated while the text in which it is founded remains in force. Furthermore, an established analogy is not exactly abrogated by a subsequent analogy. If the first analogy is based on the Qur'ān or *Sunnah*, then a conflicting analogy would presumably be erroneous. Besides, the two analogies can coexist and be counted as two *ijtihādī* opinions without the one necessarily abrogating the other, for the rule concerning *ijtihād* is that the *mujtahid* deserves a reward for his effort even if his *ijtihād* is incorrect. In short, *naskh* basically applies to binding proofs, and *qiyās* is not one of them.¹⁰

In his *Risālah*, Imām Shāfi'ī has maintained the view that *naskh* is not a form of annulment (*ilghā'*); rather, it is a suspension or termination of one ruling by another. *Naskh* in this sense is a form of explanation (*bayān*) which does not entail a total rejection of the original ruling.¹¹ *Naskh* is explanatory in the sense that it tells us of the termination of a particular ruling, the manner and the time of its termination, whether the whole of a ruling or only a part of it is terminated and, of course, the new ruling which is to take its place. However, the majority of 'ulamā' do not accept the view that *naskh* is a form of *bayān*. The fact that *naskh* terminates and puts an end to a ruling differentiates it from *bayān*, and when a ruling is terminated, it cannot be explained.

There may be instances of conflict between two texts which, after scrutiny, may turn out to be apparent rather than real, and it may be possible to reconcile them and to eliminate the conflict. One of the

two texts may be general (*‘āmm*) and the other specific (*khāṣṣ*), in which case the rules of interpretation and *takhsīs* (specification) must be applied so as to eliminate the conflict as much as possible. If the two texts cannot be so reconciled, then the one that is stronger in respect of authenticity (*thubūt*) is to be preferred. If, for example, there is a conflict between the Qur’ān and a solitary *ḥadīth*, the latter is weaker and must therefore give way to the Qur’ān. The solitary, or *āḥād*, *ḥadīth* may also be abrogated by the *mutawātir*, the *mashhūr* or another *āḥād* that is clearer in meaning or is supported by a stronger chain of narration (*isnād*). But if the two texts happen to be equal on all of these points, then the prohibitory text is to be given priority over the permissive. Furthermore, in all instances of conflict, it is essential to determine the time factor. If this can be determined, then the later in time abrogates the earlier. The chronological sequence between the two rulings can, however, only be established by means of reliable reports, not by rational argumentation or analogical reasoning.¹²

As a general rule, *naskh* is not applicable to the ‘perspicuous’ texts of the Qur’ān and *ḥadīth* known as *muhkamāt*. A text of this nature is often worded in such a way as to preclude the possibility of repeal. There are also certain subjects to which abrogation does not apply; included among these are provisions pertaining to the attributes of God, belief in the principles of the faith, and the doctrine of *tauhīd* and the Hereafter, which could not be subjected to abrogation. Another subject is the *Sharī‘ah* of Islam itself, which is the last of the revealed laws and can never be abrogated in its entirety.¹³ The ‘*ulamā’* are also in agreement that rational matters and moral truths such as the virtue of doing justice or being good to one’s parents, and vices such as the enormity of telling lies, are not changeable and are therefore not open to abrogation. Thus a vice cannot be turned into a virtue or a virtue into a vice by the application of *naskh*. Similarly the *nuṣūṣ* of the Qur’ān and *Sunnah* that relate the occurrence of certain events in the past are not open to abrogation. To give an example, the following Qur’ānic text is not amenable to the application of *naskh*: ‘As for the Thamūd, they were destroyed by a terrible storm, whereas the ‘Ād were destroyed by a furious and violent wind’ (al-Hāqqah, 69:5–6).

وَأَمَّا ثَمُودُ فَأَهْلَكُوا بِالطَّاغِيَةِ وَأَمَّا آدُ فَأَهْلَكُوا بِرِيحٍ صَرْصَرٍ عَاتِيَةٍ

To apply *naskh* to such reports would imply the attribution of lying to its source, which cannot be entertained.¹⁴

To summarise the foregoing: no abrogation can take place unless the following conditions are satisfied. First, that the text itself has not precluded the possibility of abrogation. An example of this is the Qur’ānic provision concerning persons who are convicted of slanderous accusation (*qadhif*) that they may never be admitted as witnesses (al-Nūr, 24:4). Similarly the *ḥadīth* which proclaims that ‘*jihād* shall remain valid till the day of resurrection’

الجهاد ماض إلى يوم القيامة.

obviously precludes the possibility of abrogating the permanent validity of *jihād*.¹⁵ Second, that the subject is open to the possibility of repeal. Thus the attributes of God and the principles of belief, moral virtues and rational truths, etc., are not open to abrogation. Third, that the abrogating text is of a later origin than the abrogated. Fourth, that the two texts are of equal strength in regard to authenticity (*thubūt*) and meaning (*dalālah*). Thus a textual ruling of the Qur’ān may be abrogated either by another Qur’ānic text of similar strength or by a *mutawātir ḥadīth*, and, according to the Hanafīs, even by a *mashhūr ḥadīth*, as the latter is almost as strong as the *mutawātir*. By the same token, one *mutawātir ḥadīth* may abrogate another. However, according to the preferred (*rājiḥ*) view, neither the Qur’ān nor the *mutawātir ḥadīth* may be abrogated by a solitary *ḥadīth*. According to Imām Shāfi‘ī, however, the *Sunnah*, whether as *mutawātir* or *āḥād*, may not abrogate the Qur’ān.¹⁶ Fifth, that the two texts are genuinely in conflict and can in no way be reconciled with one another. And lastly, that the two texts are separate and are not related to one another in the sense of one being the condition (*sharṭ*), qualification (*uṣūf*) or exception (*istithnā*) to the other. For when this is the case, the issue is likely to be one of specification (*takhsīs*), or qualification (*taqyīd*) rather than abrogation.¹⁷

I. Types of Naskh

Abrogation may either be explicit (*ṣarḥ*) or implicit (*dimnī*). In the case of explicit abrogation, the abrogating text clearly repeals one ruling and substitutes another in its place. The facts of abrogation, including the chronological order of the two rulings, the fact that they are genuinely in conflict, and the nature of each of the two rulings, and so forth, can be ascertained in the relevant texts. An example of this is the *ḥadīth* that states: ‘I had forbidden you from

visiting graves. Nay, visit them, for they remind you of the Hereafter.¹¹⁸

كنت نهيتكم عن زيارة القبور، ألا فزوروها فإنها تذكركم بالآخرة.

In another *hadith* the Prophet is reported to have said, 'I had forbidden you from storing away the sacrificial meat because of the large crowds. You may now store it as you wish.'¹¹⁹

كنت نهيتكم عن ادخار لحوم الأضاحي لأجل الدفافة، ألا فادخروها.

The initial order not to store the sacrificial meat during the 'id festival ('*id al-adhā*) was given in view of the large number of visitors who attended the festival in Medina, where the Prophet desired that they should be provided with necessary foodstuffs. The restriction was later removed as the circumstances had changed. In both these examples, the text leaves no doubt as to the nature of the two rulings and all the other relevant facts of abrogation. An example of explicit abrogation in the Qur'an is the passage in sūra al-Baqarah (2:142-144) with regard to the change in the direction of the *qiblah* from Jerusalem to the Ka'bah. The relevant text of the Qur'an as to the direction of the *qiblah* before and after the new ruling is clear, and leaves no doubt about the facts of abrogation and the nature of the change that was effected thereby.²⁰

In the case of implicit abrogation, the abrogating text does not clarify all the relevant facts. Instead, we have a situation where the Lawgiver introduces a ruling which is in conflict with a previous ruling and the two cannot be reconciled, while it remains somewhat doubtful whether the two rulings present a genuine case for abrogation. An example of implicit abrogation is the ruling in sūra al-Baqarah (2:180) which permitted bequests to one's parents and relatives. This was subsequently abrogated by another text (al-Nisā', 4:11) which entitled legal heirs to specific shares in inheritance. Notwithstanding the fact that the two rulings are not diametrically opposed to one another and both could be implemented in certain cases,²¹ the majority of 'ulamā' have held that the initial ruling that validated bequests to relatives has

been abrogated by the rules of inheritance. They have held that the *ayah* of inheritance prescribes specific portions for legal heirs which can be properly implemented only if they are observed in their entirety, and that the Qur'anic scheme of inheritance is precise and self-contained, and any outside interference is likely to upset the individual shares as well as the overall balance between them. Since bequest to legal heirs is seen as a principal source of such interference, it is totally forbidden. This analysis is substantiated by the explicit ruling of a *hadith* in which the Prophet is reported to have said: 'God has assigned a portion to all who are entitled. Hence there shall be no bequest to legal heirs.'²²

إن الله أعطى لكل ذي حق حقه فلا وصية لوارث.

Implicit abrogation has been sub-divided into two types: total abrogation (*naskh kull*) and partial abrogation (*naskh juz'ī*). In the case of the former, the whole of a particular *nas* is abrogated by another, and a new ruling is enacted to replace it. This may be illustrated by a reference to the two Qur'anic texts concerning the waiting period ('*iddah*) of widows, which was initially prescribed to be one year but was subsequently changed to four months and ten days. The two texts are as follows:

Those of you who are about to die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave the residence, you are not responsible for what they do of themselves (al-Baqarah, 2: 240).

والذين يتوفون منكم ويذرون أزواجا وصية لأزواجهن متاعا إلى الحول غير إخراج فإن خرجن فلا جناح عليكم

Those of you who die and leave widows, the latter must observe a waiting period of four months and ten days; when they have fulfilled their term, you are not responsible for what they do of themselves (al-Baqarah, 2: 234).

والذين يتوفون منكم ويذرون أزواجا يتربصن بأنفسهن أربعة أشهر وعشرا فإذا بلغن أجلهن فلا جناح عليكم فيما فعلن في أنفسهن

As can be seen, the provision concerning the waiting period of widows in the first *āyah* has been totally replaced by the new ruling in the second. There is no doubt on the point that both of these rulings are exclusively concerned with the same subject, namely widows. Both *āyāt* require them to observe a waiting period, whose length varies in each, and only one must be observed, not both. The two passages are thus in conflict and the latter abrogates the former. But this is a case, as already noted, of an implicit *naskh*, in that the two *āyāt* do not expound, with complete clarity, all the facts of abrogation and it is not certain whether they are genuinely in conflict, for the term 'a year's maintenance and residence' in the first *āyah* does not recur in the second. There is, in fact, no reference to either maintenance or residence in the second *āyah*. This would, for example, introduce an element of doubt concerning whether the two *āyāt* are concerned with different subjects of maintenance and 'iddah respectively. There is, in other words, a level of discrepancy which might make it possible to apply each of the two rulings to different situations. This is not to argue against the majority view which seems to be the settled law, but merely to explain why an abrogation of this type has been classified as implicit *naskh*.

Partial abrogation (*naskh juz'ī*) is a form of *naskh* in which one text is only partially abrogated by another, while the remaining part continues to be operative. An example of this is the Qur'ānic *āyah* of *qadhf* (slandering accusation), which has been partially repealed by the *āyah* of imprecation (*lī'ān*). The two texts are as follows:

Those who accuse chaste women [of adultery] and then fail to bring four witnesses to prove it shall be flogged with eighty lashes (al-Nūr, 24:4).

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَا يَأْتُونَ بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ
مِائَتًا جُلْدَةً

Those who accuse their spouses and have no witnesses, other than their own words, to support their claim, must take four solemn oaths in the name of God and testify that they are telling the truth (al-Nūr, 24:6).

وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ
فَشَهَادَةُ أَحَدِهِمْ أَرْبَعَةُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الصَّادِقِينَ

The first *āyah* lays down the general rule that anyone, be it a spouse or otherwise, who accuses chaste women of *zinā* must produce four

witnesses for proof. The second *āyah* provides that if the accuser happens to be a spouse who cannot provide four witnesses and yet insists on pursuing the charge of *zinā*, he may take four solemn oaths to take the place of four witnesses. This is to be followed, as the text continues, by a statement in which the husband invokes the curse of God upon himself if he tells a lie. The ruling of the first text has thus been repealed by the second text insofar as it concerns a married couple.²³

It will be noted that the text of the Qur'ān has two distinctive features, namely, the words of the text, and the ruling, or *hukm*, that it conveys. Reading and reciting the words of the Qur'ān, even if its ruling is abrogated, still commands spiritual merit. The words are still regarded as part of the Qur'ān and *ṣalāh* can be performed by reciting them. It is on the basis of this distinction between the words and the rulings of the Qur'ān that *naskh* has once again been classified into three types. The first and the most typical variety of abrogation is referred to as *naskh al-hukm*, or *naskh* in which the ruling alone is abrogated while the words of the text are retained. All the examples we have given so far of the incidence of *naskh* in the Qur'ān fall into this category. Thus the words of the Qur'ānic text concerning bequests to relatives (al-Baqarah, 2:180) and the one concerning the 'iddah of widows (al-Baqarah, 2:240) are still a part of the Qur'ān despite the fact that they have both been abrogated. We still recite them as such, but do not apply the law that they convey. The other two varieties of *naskh*, respectively referred to as *naskh al-tilāwah* (sometimes as *naskh al-qirā'ah*), that is abrogation of the words of the text while the ruling is retained, and *naskh al-hukm wa al-tilāwah*, that is abrogation of both the words and the ruling – are rather rare and the examples which we have are not supported by conclusive evidence. Having said this, however, we might add that, except for a minority of Mu'tazili scholars, the 'ulamā' are generally in agreement on the occurrence of abrogation in both these forms.²⁴ An example of *naskh al-tilāwah* is the passage which, according to a report attributed to 'Umar ibn al-Khaṭṭāb, was a part of the Qur'ān, although the passage in question does not appear in the standard text. However, the ruling conveyed by the passage in question still represents authoritative law. The reported version of this text provides: 'When a married man or a married woman commits *zinā*, their punishment shall be stoning as a retribution ordained by God.'²⁵

الشيخ والشيخة إذا زنيا فأرجوهما البتة نكالا من الله.

In the event where the words of the text, and the law that they convey, are both repealed, then the text in question is of little significance. According to a report which is attributed to the Prophet's widow, 'Ā'ishah, it had been revealed in the Qur'ān that ten clear suckings by a child make marriage unlawful between that child and others who drank the same woman's milk. Then it was abrogated and substituted by five suckings and it was then that the Messenger of God died. The initial ruling which required ten suckings was read into the text of the Qur'ān. The ruling was then repealed and the words in which it was conveyed were also omitted from the text. However since neither of these reports is established by *ṭawātur*, they are not included in the Qur'ān. The position now, according to the majority of 'ulamā', is that either five clear suckings, or any amount which reaches the stomach, even if it be one large sucking, constitutes the grounds of prohibition.²⁶

According to the majority (*jumhūr*) view, the Qur'ān and the *Sunnah* may be abrogated by themselves or by one another. In this sense, abrogation may be once again classified into the following varieties. (1) Abrogation of the Qur'ān by the Qur'ān, which has already been illustrated. (2) Abrogation of the *Sunnah* by the *Sunnah*. This too has been illustrated by the two *ḥadīth* which we quoted under the rubric of explicit abrogation. (3) Abrogation of the Qur'ān by *Sunnah*. An example of this is the *āyah* of bequest in sūra al-Baqarah (2:180) which has been abrogated by the *ḥadīth* that provides that 'there shall be no bequest to an heir'. It is generally agreed that 'the Qur'ān itself does not abrogate the *āyah* of bequest and there remains little doubt that it has been abrogated by the *Sunnah*'.²⁷ (4) Abrogation of the *Sunnah* by the Qur'ān. An example of this is the initial ruling of the Prophet which determined the *qiblah* in the direction of Jerusalem. When the Prophet migrated to Medina, he ordered the believers to pray in the direction of Jerusalem. This was later repealed by the Qur'ān (al-Baqarah, 2:144) which ordered the Muslims to turn their faces toward the holy mosque of the Ka'bah.²⁸ The Qur'ān, in other words, abrogated a practice that was initially authorised by the *Sunnah*. On a similar note, the obligation of fasting on the day of 'Āshūrā' was established by the *Sunnah* and this was in turn abrogated by the Qur'ānic text (al-Baqarah, 2:185) that commanded fasting during the month of Ramaḍān.

The main exception to the foregoing classification of *naskh* is taken by Imām Shāfi'ī, the majority of the Mu'tazilah and Ahmad ibn Hanbal (according to one of two variant reports), who have validated the first two types of abrogation, but have overruled the validity of the remaining two. In their view, abrogation of the Qur'ān by the *Sunnah* and vice versa is not valid.²⁹ This is the conclusion al-Shāfi'ī has drawn from his interpretation of a number of Qur'ānic *āyāt* where it is indicated that the Qur'ān can only be abrogated by the Qur'ān itself.³⁰ Thus we read in sūra al-Nahl (16:101): 'And when We substitute one *āyah* in place of another *āyah*, and God knows best what He reveals.'

إذا بدلنا آية مكان آية والله أعلم بما يتولى

This text, according to al-Shāfi'ī, is self-evident on the point that an *āyah* of the Qur'ān can only be abrogated or replaced by another *āyah*. The fact that the *āyah* occurs twice in this text provides conclusive evidence that the Qur'ān may not be abrogated by the *Sunnah*. This is confirmed by the word *na'ti* (We bring) in which God refers to Himself, which must mean that only the Qur'ān can abrogate itself. The proper role of the *Sunnah* is therefore to explain, but not to abrogate, the Qur'ān. In another place, the Qur'ān reads: 'None of our revelations do We abrogate or cause to be forgotten unless We substitute for them something better or similar (al-Baqarah, 2:106).'

ما ننسخ من آية أو ننسها نأت بخير منها أو مثلها

The text in this *āyah* is once again clear on the point that in the matter of *naskh*, the Qur'ān refers only to itself. The Qur'ān, in other words, is self-contained in regard to *naskh*, and this precludes the possibility of it being abrogated by the *Sunnah*. *Naskh* in the Qur'ān, according to al-Shāfi'ī, is a wholly internal phenomenon, and there is no evidence in the Qur'ān to suggest that it can be abrogated by the *Sunnah*. Indeed the Qur'ān asks the Prophet to declare that he himself cannot change any part of the Qur'ān. This is the purport of the text in sūra Yūnus (10:15) which provides: 'Say: it is not for me to change it of my own accord. I only follow what is revealed to me.'

قل ما يكون لي أن أبديله من تلقاء نفسي إن أتبع إلا ما يوحى إليّ

It is thus not within the Prophet's terms of reference to abrogate the Qur'ān on his own initiative. 'The *Sunnah* in principle', writes al-Shāfi'i, 'follows, substantiates and clarifies the Qur'ān; it does not seek to abrogate the Book of God'.³¹ All this, al-Shāfi'i adds, is reinforced in yet another passage in the Qur'ān where it is stated: 'God blots out or confirms what He pleases. With Him is the Mother of the Book' (al-Ra'd, 13:39).

بمحو الله ما يشاء ويثبت وعنده أم الكتاب

The reference here is again to *naskh* and the source in which it originates is the Mother of the Book, that is, the Qur'ān itself. The *Sunnah*, even the *mutawātir* *Sunnah*, may not abrogate the Qur'ān. Al-Shāfi'i is equally categorical on the other limb of this theory, namely that the Qur'ān does not abrogate the *Sunnah* either. Only the *Sunnah* can abrogate the *Sunnah*: *mutawātir* by *mutawātir* and *āḥād* by *āḥād*. *Mutawātir* may abrogate the *āḥād*, but there is some disagreement on whether the *āḥād* can abrogate the *mutawātir*. According to the preferred view, which is also held by al-Shāfi'i, the *āḥād*, however, can abrogate the *mutawātir*. To illustrate this, al-Shāfi'i refers to the incident when the congregation of worshippers at the mosque of Qubā' were informed by a single person (*khābar al-wāḥid*) of the change of the direction of the *qiblah* from Jerusalem to the Ka'bah; they acted upon it and turned their faces toward the Ka'bah. The fact that Jerusalem was the *qiblah* had been established by continuous, or *mutawātir*, *Sunnah*, but the congregation of Companions accepted the solitary report as the abrogator of *mutawātir*.³²

Al-Shāfi'i elaborates his doctrine further. If there existed any occasion for the *Sunnah* to abrogate the Qur'ān or vice versa, the Prophet would be the first to say so. Thus in all cases where such an abrogation is warranted, there is bound to be a *Sunnah* of the Prophet to that effect, in which case the matter automatically becomes a part of the *Sunnah*. The *Sunnah* in other words is self-contained, and covers all possible cases of conflict and abrogation of the Qur'ān by the *Sunnah* and vice versa. If any *Sunnah* is meant to be abrogated, the Prophet himself would do it by virtue of another *Sunnah*, hence there is no case for the abrogation of *Sunnah* by the Qur'ān.³³

Al-Shāfi'i considers it necessary for the abrogation of *Sunnah* that the Prophet should have informed the people specifically about it. If the Qur'ān were to abrogate the *Sunnah*, while the Prophet has not indicated such to be the case, then, to give an example, all the

varieties of sale that the Prophet had banned prior to the revelation of the Qur'ānic *āyah* on the legality of sale (al-Baqarah, 2:275) would be rendered lawful with the revelation of this *āyah*. Similarly, the punishment of stoning for *zinā* authorised by the Prophet would be deemed abrogated by the variant ruling of one hundred lashes in *sūra* al-Nūr (24:2). In the case of theft, too, the Prophet did not punish anyone for theft below the value of one-quarter of a dinar, nor did he apply the prescribed punishment to the theft of unguarded (*ghayr mulḥraz*) property. These would all be deemed abrogated following the revelation of the *āyah* in *sūra* al-Mā'idah (5:38) which prescribes mutilation of the hand for theft without any qualification whatsoever. If we were to open this process, it would be likely to give rise to unwarranted claims of conflict and a fear of departure from the *Sunnah*.³⁴

Notwithstanding the strong case al-Shāfi'i has made in support of his doctrine, the majority opinion, which admits abrogation of the Qur'ān and *Sunnah* by one another, is preferable as it is based on the factual evidence of having actually taken place. Al-Ghazālī is representative of the majority opinion on this when he writes that identity of source (*tajānus*) is not necessary in *naskh*. The Qur'ān and *Sunnah* may abrogate one another as they are of the same provenance. While referring to al-Shāfi'i's doctrine, al-Ghazālī comments: 'How can we sustain this in the face of the evidence that the Qur'ān never validated Jerusalem as the *qiblah*? It was validated by the *Sunnah*, but its abrogating text occurs in the Qur'ān. Likewise, the fasting of 'Ashūrā' was abrogated by the Qur'ānic provision concerning the fasting of Ramaḍān, while the former was only established by the *Sunnah*. Furthermore, the Qur'ānic *āyah* which permitted conjugal intercourse at night-time in Ramaḍān (al-Baqarah, 2:178) abrogated the prohibition that the *Sunnah* had previously imposed on conjugal relations during Ramaḍān.'³⁵

II. Abrogation, Specification (*Takhṣīs*) and Addition (*Taz'id*)

Naskh and *takhṣīs* resemble one another in that both tend to qualify or specify an original ruling in some way. This is particularly true, perhaps, of partial *naskh*, which really amounts to qualification or specification rather than repeal. We have already noted al-Shāfi'i's perception of *naskh* which draws close to the idea of the coexistence of two rulings and an explanation of one by the other. A certain

amount of confusion has also arisen between *naskh* and *takhṣiṣ* due to conceptual differences between the Hanafis and the majority of 'ulamā' regarding *naskh* in that they tend to view *naskh* differently from one another. These differences of perspective have, however, been treated more pertinently in our discussion of the 'āmm and the *khāṣ*. In this section, we shall outline the basic differences between *naskh* and *takhṣiṣ* without attempting to expound the differences between the various schools on the subject.

Naskh and *takhṣiṣ* differ from one another in that there is no real conflict in *takhṣiṣ*. The two texts, namely the general text and the specifying text, in effect complement one another. This is not, however, the case with *naskh*, in which it is necessary that the two rulings are genuinely in conflict and that they could not coexist. Another difference between *naskh* and *takhṣiṣ* is that *naskh* can occur in respect of either a general or a specific ruling whereas *takhṣiṣ* can, by definition, occur in respect of a general ruling only.³⁶

As already stated, *naskh* is basically confined to the Qur'an and *Sunnah* and can only be effected by the explicit rulings of divine revelation. *Takhṣiṣ*, on the other hand, can also occur on the grounds of rationality and circumstantial evidence. *Naskh*, in other words, can only occur by *shar'* whereas *takhṣiṣ* can occur by rationality ('aql), custom ('urf) and other rational proofs. It would follow from this that *takhṣiṣ* (i.e. the specification or qualification of a general text) is possible by means of speculative evidence such as *qiyās* and solitary *ḥadīth*. But in the case of *naskh*, a definitive ruling, that is a *qat'i*, can only be abrogated by another *qat'i* ruling. Abrogation, in other words, is basically not operative with regard to speculative rulings.³⁷

As already stated, in *naskh* it is essential that the abrogator (*al-nāsikh*) is later in time than the ruling it seeks to abrogate. There can be no *naskh* if this order is reversed, or even where the two rulings are known to have been simultaneous. But this is not a requirement of *takhṣiṣ*. With regard to *takhṣiṣ*, the Hanafis maintain that the 'āmm and the *khāṣ* must in fact be either simultaneous or parallel in time. But according to the majority, the 'āmm and the *khāṣ* can precede or succeed one another and they need not be in any particular chronological order. This is illustrated in the two *āyāt* regarding *qadhf* (slanderous accusation) and *li'ān* (divorce by mutual imprecation) in sūra al-Nūr (24:4 and 6 respectively). The first was revealed in the form of a general law ('āmm), but at a time when there was an occasion for its enforcement, and the Prophet was considering it when the second *āyah* was revealed and specified. This is in accordance with the view

of Imām al-Shāfi'i, where the general of the first is specified in respect particularly of a married couple. The Shāfi'i view here is based on the premise that the specifier of a general ruling need not be simultaneous or parallel in time with the general; it may be subsequent in time or parallel, or indeed any time when the need for specification may arise, regardless as to whether the initial ruling has been implemented or not.

The Hanafis, on the other hand, maintain that the two rulings above were separate and the Prophet attempted to implement the first as a general law; and it was then that the second *āyah* was revealed and, therefore, partially abrogated the first even if the first had not in fact been implemented. Based on this analysis, the Hanafis also maintain that there is no *naskh* between the two *āyāt* in sūra al-Anfāl (8:65 and 66 respectively) because they were parallel in time, and there is no evidence to suggest that there was an interval between them during which the first might have been implemented independently of the second. The two *āyāt* here indicate that one hundred steadfast Muslim warriors will vanquish one thousand unbelievers, according to the first, and two hundred according to the second. The question is basically over numbers and also, by implication, whether it might be permissible for a certain number of Muslim fighters to turn away from battle if confronted by a much larger number of enemy soldiers.

Lastly, *naskh* does not apply to factual reports of events (*akhbār*), whereas *takhṣiṣ* can occur in regard to factual reports. Thus a news report may be specified or qualified, but cannot be abrogated. The closest concept to abrogation in regard to reports is that they can be denied.

Another issue that arises concerning *naskh* is whether a subsequent addition (*taẓ'id*) to an existing text, which may be at variance with it, amounts to its abrogation. When new materials are added to an existing law, the added materials may fall into one of the following two categories. (1) The addition may be independent of the original text but relate to the same subject, such as adding a sixth *ṣalāh* to the existing five. Does this amount to the abrogation of the original ruling? The majority of 'ulamā' have answered this question in the negative, holding the view that the new addition does not overrule the existing law but merely adds a new element to it. (2) The new addition may not be independent of the original text in that it may be dealing with something that constitutes an integral part of the original ruling. A hypothetical example of this would be to add another unit (*rak'ah*), or an additional prostration (*sajdah*), to one or more of the existing

obligatory prayers. Another example would be to add to the existing requirement of releasing a slave in expiation for breaking the fast a new condition that the slave has to be a Muslim. Does this kind of addition amount to the abrogation of the existing law? The 'ulamā' have differed on this, but once again the majority have held the view that it does not amount to abrogation as it does not seek to overrule the original text. The Hanafis have held, however, that such an addition does amount to abrogation. It is on this ground that the Hanafis have considered the ruling of the *āḥād ḥadīth* on the admissibility of one witness plus a solemn oath by the claimant to be an abrogation of the Qur'anic text which enacts two witnesses as standard legal proof (al-Baqarah, 2:282). The abrogation, however, does not occur, not because the Hanafis consider the new addition to be immaterial, but because the *āḥād ḥadīth* cannot repeal the *mutawātir* of the Qur'ān.³⁸ The majority opinion does not regard this to be a case for abrogation, for the Qur'anic text on the requirement of two witnesses does not preclude the possibility of proof by other methods. Since the original Qur'anic text does not impose an obligatory command, it leaves open the possibility of recourse to alternative methods of proof.³⁹

III. The Argument against *Naskh*

As already stated, the 'ulamā' are not unanimous about the occurrence of *naskh* in the Qur'ān. While al-Suyūṭī has claimed, in his *Itqān fi 'Ulūm al-Qur'ān*, twenty-one instances of *naskh* in the Qur'ān, Shāh Walī Allāh (d. 1762 AD) has only retained five of al-Suyūṭī's twenty-one cases as genuine, stating that all the rest can be reconciled.⁴⁰ Another scholar, Abū Muslim al-Isfahānī (d. 934 AH) has, on the other hand, denied the incidence of abrogation in the Qur'ān altogether.⁴¹ The majority of 'ulamā' have nevertheless acknowledged the incidence of *naskh* in the Qur'ān on the authority of the Qur'ān itself. This is the conclusion that the majority have drawn from the relevant Qur'anic passages. However, it will be noted that the counter-argument is also based on the same Qur'anic passages that have been quoted in support of *naskh*. The following two *āyāt* need to be quoted again: 'None of our revelations do We abrogate nor cause to be forgotten unless We substitute for them something better or similar' (al-Baqarah, 2:106).

ما ننسخ من آية أو ننسها نأت بخير منها أو مثلها

Elsewhere we read in sūra al-Nahl (16:101): 'When We substitute one revelation for another, and God knows best what He reveals.'

وإذا بدلنا آية مكان آية والله أعلم بما يزل

To some commentators, the word '*āyah*' in these passages refers not to the text of the Qur'ān itself, but to previous scriptures including the Torah and the Bible. An interpretation of this type would, of course, render the *āyah* under discussion irrelevant to the occurrence of *naskh* in the Qur'ān. Abū Muslim al-Isfahānī, a Mu'tazili scholar and author of a Qur'ān commentary (*Jāmi' al-Ta'wīl*), has held the view that all instances of so-called abrogation in the Qur'ān are in effect no more than qualifications and *takhsīs* of one text by another.⁴² To al-Isfahānī, the word '*āyah*' in these passages means not a portion of the Qur'anic text, but 'miracle'. To read this meaning in the first of the two passages quoted above would imply that God empowered each of His Messengers with miracles that none other possessed; that God provided each of His Messengers with superior miracles, one better than the other. That this is the correct meaning of the text is substantiated, al-Isfahānī adds, by the subsequent portion of the same passage (i.e. al-Baqarah, 2:106) which reads: 'Do you not know that God is all-powerful?'

ألم تعلم أن الله على كل شيء قدير

Thus this particular attribute of God relates more appropriately in this context to the subject of miracles than to the abrogation of one *āyah* by another. This interpretation finds further support in yet another portion of the same passage (al-Baqarah, 2:108) which provides in an address to the Muslim community: 'Would you want to question your Prophet as Moses was questioned before?'

ألم تريدون أن تسألوا رسولكم كما سئل موسى من قبل

It is then explained that Moses was questioned by the Banī Isrā'īl regarding his miracles, not the abrogation as such.⁴³ The word '*āyah*', in the second passage (i.e. al-Nahl, 16:101) too means 'miracle'. For '*āyah*' literally means 'sign' and a miracle is a sign. Al-Isfahānī further argues: *naskh* is equivalent to *ibṭāl*, that is, 'falsification' or rendering something invalid, and *ibṭāl* as such has no place in the Qur'ān. This is what we learn from the Qur'ān itself, which reads in sūra Hā-Mīm

(41:42): 'No falsehood can approach it [the Book] from any direction.'

لا يأتيه الباطل من بين يديه ولا من خلفه

In response to this, however, it is said that *naskh* is not identical with *ihlāl*; that *naskh*, for all intents and purposes, means the suspension of a textual ruling, while the words of the text are often retained and not nullified.⁴⁴

Two other points that al-Isfahānī has added to his interpretation are as follows. Supposing that the passages under consideration do mean abrogation, even then they do not confirm the actual occurrence of *naskh* but rather the possibility of it, and there is a difference between the two. Lastly, al-Isfahānī maintains that all instances of conflict in the Qur'ān are apparent rather than real, and can be reconciled and removed. This, he adds, is only logical of the *Sharī'ah*, which is meant to be for all times; this is just another way of saying that it is not open to abrogation.⁴⁵

Having explained al-Isfahānī's refutation of the theory of *naskh*, it remains to be said that, according to the majority of 'ulamā', the occurrence of *naskh* in the Qur'ān is proven beyond dispute. It is not only confirmed by the clear text of the Qur'ān but an *ijmā'* has been claimed in its favour. Anyone who opposes it is thus going against the dictates of *ijmā'*.⁴⁶ In the face of the foregoing disagreements, it is admittedly difficult to see the existence of a conclusive *ijmā'* on the point. But according to the rules of *ijmā'*, once an *ijmā'* is properly concluded, any subsequent differences of opinion will not invalidate it. Divergent views such as that of al-Isfahānī seem to have been treated in this light, and almost totally ignored.

The 'ulamā' have, however, given altogether different accounts of the incidents of *naskh* in the Qur'ān. There are some who have exaggerated the actual instances of abrogation, and this includes Ibn Ḥazm al-Zahiri, Wahbatullāh Ibn Salamah and Jamāl al-Dīn Ibn al-Jawzi (the author of *Nawāsiḥ al-Qur'ān*) who listed the incidents of *naskh* in the Qur'ān at 214, 213 and 247 respectively. The Mu'tazilah included even the slightest variations of the text in their calculations and held the incidents of *naskh* to be 500. 'Abd al-Qādir al-Baghdādī identified sixty-six such incidents, whereas Jalāl al-Dīn al-Suyūṭī counted them at twenty-one cases; Shāh Wālī Allāh at five and Abū Muslim al-Isfahānī, as already noted, has denied *naskh* altogether. There is also a tendency among modern scholars, as I

shall presently elaborate, to reduce these allegations to the minimum possible.

The main reason behind the exaggerated figures relates to a certain overlap and confusion between *naskh* and *takhsīs*, and a parallel confusion between *naskh* and termination of the effective cause (*izālat al-sabab*) of a particular *hukm*. A *hukm* may no longer be enforceable because it is no longer needed and the cause for which it was initially issued is no longer obtainable, and this is a different matter to that of abrogation. The case of *mū'allafat al-qulūb* in the Qur'ānic provision (al-Tawbah, 9:60) which entitled them to a share in *zakāh*, and which the caliph 'Umar discontinued, illustrates our point. Similarly, a large number of Qur'ānic *āyāt* that advocated patience and tolerance towards the unbelievers were claimed to have been abrogated by the *āyāt* that authorised fighting the unbelievers. There was in reality no abrogation and both rulings were valid under different circumstances. The earlier *āyāt* applied at a time when the Muslims were small in number and weak, and the latter when they acquired military power.

The other two factors that explain the exaggerated accounts of *naskh* relate to the somewhat superficial view that scholars might have taken over the conflict of evidences, and also a mistaken perception of the pre-Islamic customs that were replaced by the *Sharī'ah* of Islam. The fact that the Qur'ān confined the number of divorces to three, and of polygamy to four, and that it proscribed marriage with one's step-mother and so forth did not mean that the preceding customary practices were abrogated. There was in fact no *naskh*; for *naskh* is by definition removal of one *shar'ī* ruling by another, and there was no *shar'ī* ruling prior to the advent of Islam. One can also find numerous instances of plausible conflict that are less than genuine and which present no occasion for *naskh*. Al-Suyūṭī has referred to many such cases, of which we refer only to the following.

There are two passages in the sūra al-Nisā' both referring to orphans as follows: 'If the guardian is affluent, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable' (al-Nisā', 4:6).

ومن كان غنيا فليستعفف ومن كان فقيرا فليأكل بالمعروف

The above *āyah* is held by some to have been abrogated by the following: 'Those who unjustly eat up the property of orphans, eat up fire into their own bodies' (al-Nisā', 4:10).

إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا

The relationship between the two *āyāt* is one of explanation in that the former specifies and explains what is not unjust and the latter addresses only what is deemed to be unjust. On a similar note, the two *āyāt* on charity which simply declare, 'And spend of what We have provided for you' (al-Munāfiqūn, 63:10)

وَأَنْفَقُوا مِمَّا رَزَقْنَاكُمْ

'And they spend out of what We have provided for them' (al-Baqarah, 2:3)

وَمَا رَزَقْنَاهُمْ يُنْفِقُونَ

were erroneously held to have been abrogated by the command concerning the payment of *zakāh*. There is no case for *naskh* here, simply because the two passages are concerned with optional charity whereas *zakāh* is a legal obligation and a particular kind of charity. The relationship between charity and *zakāh* may thus be seen as one of the general to the specific, there being no real occasion for *naskh*.

The arbitrary tone of such allegations becomes vividly clear when we note the claim that the *āyah* of the sword (9:36) has, among others, abrogated such passages as 'And speak fairly to the people' (al-Baqarah, 2:83)

وَقُولُوا لِلنَّاسِ حَسَنًا

and 'Is not God the wisest of judges?' (al-Tin, 95:8).

أَلَيْسَ اللَّهُ بِأَحْكَمَ الْحَاكِمِينَ

There is obviously no genuine conflict of evidences and the assertion that abrogation has actually occurred is simply unwarranted.

In his book *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (originally a doctoral dissertation), Abdul Hamid Abu Sulayman is critical of the classical approach to *naskh* and calls for a fresh and comprehensive understanding 'of the technique of *naskh*...on a systematic and conceptual basis, not a legalistic one'.⁴⁷ The author is of the view that the classical exposition of

naskh is unnecessarily restrictive as it tends to narrow down the 'rich Islamic and Qur'ānic experience', and also indulges, in some instances at least, in a measure of exaggeration and excess.⁴⁸

The author maintains that abrogation was primarily an historical, rather than juridical, phenomenon and ought to have been read in that context. This may be part of the reason why the jurists have found it difficult to establish the validity of abrogation by the direct evidence of the Qur'ān or *Sunnah*. The argument is that the facts of *naskh* in regard to, for example, the *āyah* of the sword, as discussed below, were historical and were largely dictated by the prevailing pattern of relations between Muslims and non-Muslims at the time. Now, instead of understanding *naskh* as a circumstance of history, the 'ulamā' turned it into a juridical doctrine of permanent validity. This classical concept of permanent abrogation is oblivious of the space-time element which, if taken into account, would have restricted the application of *naskh* to those circumstance alone.⁴⁹

The broad sweep of *naskh* was, however, taken so far as to invalidate a major portion of the Qur'ān. This is precisely the case with regard to the *āyah* of the sword (*āyah al-sayf*) which reads: 'And fight the polytheists all together as they fight you all together, and know that God is with those who restrain themselves' (al-Tawbah, 9:36).

وَقَاتِلُوا الْمُشْرِكِينَ كَافَّةً كَمَا يُقَاتِلُونَكُمْ كَافَّةً

وَاعْلَمُوا أَنَّ اللَّهَ مَعَ الْمُتَّقِينَ

Influenced by the prevailing pattern of hostile relations with non-Muslims, 'some jurists took an extreme position in interpreting this *āyah*', and claimed that it abrogated all preceding *āyāt* pertaining to patience, tolerance and the right of others to self-determination.⁵⁰ Although scholars are not in agreement on the exact number of *āyāt* that were abrogated as a result, Mustafā Abū Zayd has found that the *āyah* of the sword abrogated no less than 140 *āyāt* in the Holy Book.⁵¹ Jurists who were inclined to stress the aggressive aspect of *jihād* could only do so by applying abrogation to a large number of Qur'ānic *āyāt*, and 'using abrogation in this manner has', Abu Sulayman contests, 'indeed narrowed the Qur'ānic experience'⁵² and undermined the egalitarian substance of its teachings. In many passages the Qur'ān calls for peace, compassion and forgiveness, and promotes a set of moral values such as moderation, humility, patience and tolerance whose scope could not be said to be confined to relations among Muslims alone.

The Muslim jurists of the second century *hijrah*, as al-Zuhayli informs us, considered war as the norm, rather than the exception, in relations with non-Muslims, and they were able to do so partly because of a certain exaggeration in the use and application of *naskh*. The reason behind this attitude was the need, then prevalent, to be in a state of constant readiness for battle in order to protect Islam.⁵³ Under such political circumstances, it is not difficult to understand how abrogation was utilised as a means by which to strengthen the morale of the Muslims in facing their enemies.⁵⁴ It is to be noted further that the position of the classical jurists which characterised war as the permanent pattern of relationship with non-Muslims, as al-Zuhayli points out, is not binding on anyone, and is not supported by the balance of evidence in the Qur'ān and *Sunnah*.⁵⁵

Ahmad Hasan has reached the conclusion that the classical theory of *naskh* cannot go back to the Prophet because we do not find any information from the Prophet about the existence of abrogated verses in the Qur'ān. Had any passages been actually repealed, the Prophet would have definitely drawn attention to it. It is further noted that the Companions differed among themselves with regard to the abrogation of certain verses. To give an example, Ibn 'Umar is reported to have said, concerning the fast of Ramaḍān, that the *āyah* that declared 'and for those who can do it [with hardship] there is ransom - the feeding of a man in need' (al-Baqarah, 2:184)

وعلى الذين يطيقونه فدية طعام مسكين

has been abrogated by the text 'And whoever of you is present, let him fast the month' (al-Baqarah, 2:185).

فمن شهد منكم الشهر فليصمه

But Ibn 'Abbas disagreed and said that the first *āyah* was still operative in the case of the elderly who may feed a poor man every day in lieu of each day of fasting. Almost every passage that is held to be abrogated by one Companion is questioned by another, and this would seem to confirm that they had not received any instructions concerning those passages from the Prophet. The fact that some Qur'ānic passages were subsequently modified and improved did not necessarily prove that they were abrogated. Since the Qur'ān is meant to be for all ages and climes, Ahmad Hasan tells us, it is inconceivable that the Prophet would have left such an important issue open

to disagreement and debate. Then all that remains to be said is that the historical context of each revelation must be studied in conjunction with the alleged cases of *naskh* if the Qur'ān is to be adequately understood.⁵⁶

I conclude this section with two comments, one of which is concerned with a particular variety of *naskh*, and the other with *naskh* as a whole. My specific comment relates to *naskh al-hukm wa'l-tilāwah*, or that variety of *naskh* in which both the ruling and words of the Qur'ān have been abrogated. To include such a variety in the typology of *naskh* is somewhat imaginary and presumptive, and no clear incidence of it has been recorded. To admit such a hypothetical classification within the rubric of *naskh* stretches the limits of speculation and opens the door to unwarranted assertions over the integrity and completeness of the Qur'ān. It is therefore suggested that *naskh al-hukm wa'l-tilāwah* should be discarded altogether.

My general comment is that the theory of *naskh* and most of its cited examples are also open to a variety of doubts. *Naskh* as a whole is really too controversial to command the alleged support of the majority (*jumhūr*) of Muslim scholars in its favour. To say that there were instances where some of the rulings of *Sunnah*, or even of the Qur'ān, were amended due to the change of circumstances is not in doubt. But then to extend the scope of this essentially circumstantial phenomenon to a juridical doctrine with a theory, definition and typology of its own is less than warranted. *Naskh* is basically factual and has little juridical substance of its own, nor does it seem to have a direct bearing on the substance of legal theory. If there is a proven case of amendment or abrogation of specific rules, we may include it in our study of the *furū'* al-*fiqh*. For this is where *naskh* basically belongs, and the prominence it has been given in the conventional scheme of *uṣūl* al-*fiqh* is, perhaps, due for a revision. In all other cases of alleged and unproven incidents of *naskh*, the normal course to take would be to presume the continued validity of the original ruling or text as under the doctrine of *istishāb* (presumption of continuity) and, failing that, to refer the matter to *ijtihād*. The exaggerated aspects of the conventional theory of *naskh* should consequently be discarded and *naskh* should be seen as no more than an incidental development in the early history of the *Sharī'ah*.

NOTES

1. Ghazālī, *Mustafā*, I, 69; Āmidī, *Ihkām*, III, 120ff; Hītū, *Wajiz*, p. 241.
2. Ibid.; Badrān, *Uṣūl*, p. 442.
3. Khallāf, *Ilm*, p. 222; Abū Zahrah, *Uṣūl*, p. 148.
4. Shāfi'ī, *Risālah*, III, 63; Badrān, *Uṣūl*, p. 447.
5. Tāj, *Siyāsah*, p. 14.
6. Badrān, *Uṣūl*, p. 458.
7. Āmidī, *Ihkām*, III, 161; Tāj, *Siyāsah*, p. 28.
8. Khallāf, *Ilm*, p. 228.
9. Badrān, *Uṣūl*, p. 459.
10. Āmidī, *Ihkām*, III, 163ff; Badrān, *Uṣūl*, p. 459.
11. Shāfi'ī, *Risālah*, p. 103; Abū Zahrah, *Uṣūl*, p. 148.
12. Ghazālī, *Mustafā*, I, 83; Badrān, *Uṣūl*, p. 455.
13. Ibid., I, 72.
14. Badrān, *Uṣūl*, p. 454; Hītū, *Wajiz*, p. 144.
15. Abū Dāwūd, *Sunan*, II, 702; *ḥadīth* no. 2826; Abū Zahrah, *Uṣūl*, p. 150.
16. Shāfi'ī, *Risālah*, p. 54; Āmidī, *Ihkām*, III, 146ff.
17. Hītū, *Wajiz*, p. 244; Khallāf, *Ilm*, p. 223.
18. Tabrizī, *Mishkāt*, I, 552, *ḥadīth* no. 1762; Muslim, *Ṣaḥīḥ*, p. 340.
19. Ibid., *ḥadīth* no. 1762; Ghazālī, *Mustafā*, I, 83; Āmidī, *Ihkām*, III, 181.
20. Another instance of explicit *naskh* in the Qur'ān is the passage in sūra al-Anfal (8:65-66) which encourages the Muslims to fight the unbelievers. The passage reads as follows: 'If there be of you twenty steadfast persons, they shall overcome two hundred, and if there be one hundred of you, they shall overcome one thousand.' The subsequent *āyah* reviewed these figures as follows: 'Now God has lightened your burden...if there be of you one hundred steadfast persons, they shall overcome two hundred, and if there be of you one thousand, they shall overcome two thousand.'
21. Shāfi'ī (*Risālah*, p. 69) has observed concerning these *āyāt* that the abrogation of bequests to relatives by the *āyah* of inheritance is a probability only, but he adds that the 'ulamā' have held that the *āyah* of inheritance has abrogated the *āyah* of bequests. On the same page, Shāfi'ī quotes the *ḥadīth* that 'there shall be no bequest to an heir'. It thus appears that in his view, the abrogation of bequest to legal heirs in the Qur'ān is a probability which has been confirmed and explained by this and other *ḥadīth* on the subject.
22. Shāfi'ī, *Risālah*, p. 69; Abū Dāwūd, *Sunan*, II, 808, *ḥadīth* no. 2864; Khallāf, *Ilm*, p. 224.
23. Shāfi'ī, *Risālah*, p. 72; Khallāf, *Ilm*, p. 227.
24. Āmidī, *Ihkām*, III, 141.
25. The Arabic version reads: 'al-shaykhū wa'l-shaykhatu idha zanayā farjunūhumā al-bataiah nakālah min Allāh'. Both Ghazālī (*Mustafā*, I, 80) and Āmidī (*Ihkām*, III, 141) have quoted it. 'Umar b. al-Khaṭṭāb is quoted to have added: 'Had it not been for fear of people saying that 'Umar made an addition to the Qur'ān, I would have added this to the text of the Qur'ān.'
26. Āmidī, *Ihkām*, III, 153.
27. Hītū, *Wajiz*, p. 252. See also Qadrī, *Islamic Jurisprudence*, p. 230.
28. Ibid.
29. Āmidī, *Ihkām*, III, 153.
30. Shāfi'ī, *Risālah*, p. 54ff; Āmidī, *Ihkām*, III, 156ff; Zuhaylī, *Uṣūl*, p. 463.
31. Shāfi'ī, *Risālah*, p. 54.
32. Ibid., p. 177; Ghazālī, *Mustafā*, I, 81.
33. Shāfi'ī, *Risālah*, p. 102.
34. Ibid., pp. 57-8. In raising the fear of departure from the *Sunnah*, Shāfi'ī was probably thinking of the doubts that would arise with regard to establishing the precise chronological order between the Qur'ān and *Sunnah* in all possible cases of conflict. Since the Qur'ān is generally authentic, any doubts of this nature are likely to undermine the *Sunnah* more than the Qur'ān.
35. Ghazālī, *Mustafā*, I, 81; see also Āmidī, *Ihkām*, III, 150ff.
36. Ghazālī, *Mustafā*, I, 71; Badrān, *Uṣūl*, p. 452.
37. Āmidī, *Ihkām*, III, 113; Badrān, *Uṣūl*, p. 453.
38. Āmidī, *Ihkām*, III, 170; Hītū, *Wajiz*, p. 256.
39. Āmidī, *Ihkām*, III, 175; Hītū, *Wajiz*, p. 257.
40. Subḥī al-Ṣāliḥ, (*Mabāḥith*, p. 280) records the view that only ten of al-Suyūṭī's twenty-one instances of *naskh* in the Qur'ān are genuine and that all the rest can be reconciled.
41. Abū Zahrah, *Uṣūl*, p. 155; Denffer, *Uṣūl*, p. 110.
42. Subḥī al-Ṣāliḥ, *Mabāḥith*, p. 274.
43. Āmidī, *Ihkām*, III, 120.
44. Ibid., III, 124.
45. Abū Zahrah, *Uṣūl*, p. 155; Badrān, *Uṣūl*, p. 448.
46. Ghazālī, *Mustafā*, I, 72.
47. See for details al-Suyūṭī, *al-Iṣṣān*, II, 22ff; Ismā'īl, *Maṣādir*, p. 148ff.
48. Abu Sulayman, *The Islamic Theory*, p. 84.
49. Ibid., p. 107.
50. Ibid., p. 73.
51. Ibid., p. 36.
52. Abū Zayd, *al-Nāsikh wa al-Mansūkh*, I, 289ff and II, 503ff.
53. Abu Sulayman, *The Islamic Theory*, p. 36.
54. Al-Zuhaylī, *Aḥdā al-Ḥarb*, p. 130.
55. Abu Sulayman, *The Islamic Theory*, p. 74.
56. Al-Zuhaylī, *Aḥdā al-Ḥarb*, p. 135.

Ijmā' (Consensus of Opinion)

It must be noted at the outset that unlike the Qur'ān and *Sunnah*, *ijmā'* does not directly partake of divine revelation. As a doctrine and proof of *Shari'ah*, *ijmā'* is basically a rational proof. The theory of *ijmā'* is also clear on the point that it is a binding proof. But it seems that the very nature of the high status that is accorded to *ijmā'* has demanded that only an absolute and universal consensus would qualify, although absolute consensus on the rational content of *ijmā'* has often been difficult to obtain. It is only natural and reasonable to accept *ijmā'* as a reality and a valid concept in a relative sense, but factual evidence falls short of establishing the universality of *ijmā'*. The classical definition and the essential requirements of *ijmā'*, as laid down by the 'ulamā' of *uṣūl*, are categorical on the point that nothing less than a universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive *ijmā'*. There is thus no room whatsoever for disagreement, or *ikhtilāf*, within the concept of *ijmā'*. The theory of *ijmā'* is equally unresponsive to the idea of relativity or a preponderance of agreement within its ranks.

The notion of a universal *ijmā'* was probably inspired by the ideal of the political unity of the *ummah*, and its unity in faith and *tawhīd*, rather than total consensus on juridical matters. As evidence will show, *ijmā'* on particular issues, especially on matters that are open to *ijtihād*, is extremely difficult to prove. Thus the gap between the theory and practice of *ijmā'* remains a striking feature of this doctrine. A universal *ijmā'* can only be said to exist, as al-Shāfi'i has observed, on the obligatory duties, that is, the five pillars of the faith, and other such matters on which the Qur'ān and the *Sunnah*

are unambiguous and decisive. However, the weakness of such an observation becomes evident when one is reminded that *ijmā'* is redundant in the face of a decisive ruling of the Qur'ān or the *Sunnah*.

The *Shari'ah* has often been considered 'a diversity within unity'. This is true in a general sense, in that there is unity in the essentials and in the broad outlines of the *ahkām*. But the same cannot be said of the detailed rulings of the jurists. It is admittedly true to say, again in a general sense, that the *ikhtilāf* of individual jurists, or of the various schools of law, are different manifestations of the same divine will and may therefore be regarded as an essential unity. But to expect universal consensus on *ijtihādī* matters is totally unrealistic, as many prominent 'ulamā' have recognised.

The gap between the theory and practice of *ijmā'* is reflected in the difficulty that many jurists have acknowledged to exist in implementing its theoretical requirements. The absolute terms of the classical definition of *ijmā'* have hardly been fulfilled by conclusive factual evidence that would eliminate all levels of *ikhtilāf*. *Ijmā'* has often been claimed for rulings on which only a majority consensus had existed within or beyond a particular school. The proof and authenticity of *ijmā'* has, on the other hand, not received the kind of attention that has been given to the authentication of *ḥadīth* through a reliable *isnād*. The only form of *ijmā'* that has been generally upheld is that of the Companions of the Prophet, which is partly due to their special status and not always due to their participation and consensus. With these introductory remarks, then, we may begin to examine the meaning and definition of *ijmā'*, and then proceed to discuss some of the issues we have raised.

I. The Definition and Value of *Ijmā'*

Ijmā' is the verbal noun of the Arabic word *ajma'a*, which has two meanings: to determine and to agree upon something. To give an example of the former, the expression *ajma'a fulān 'alā kadhā*, means that 'so-and-so decided upon such-and-such'. This usage of *ajma'a* is found both in the Qur'ān and in the *ḥadīth*.¹ The other meaning of *ajma'a* is 'unanimous agreement'. Hence the phrase *ajma'a al-qawm 'alā kadhā* means 'the people reached a unanimous agreement on such-and-such'. The second meaning of *ijmā'* often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter. Whereas a decision can be

made by one individual or by many, unanimous agreement can only be reached by a plurality of individuals.

Ijmā' is defined as the unanimous agreement of the *mujtahidūn* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter.² In this definition, the reference to the *mujtahidūn* precludes the agreement of laymen from the purview of *ijmā'*. Similarly, the phrase 'the *mujtahidūn* of any period', refers to period in which there exists a number of *mujtahidūn* at the time an incident occurs. Hence it would be of no account if a *mujtahid* or a number of *mujtahidūn* become available only after the occurrence of an incident. The reference in the definition to 'any matter' implies that *ijmā'* applies to all juridical (*shar'i*), intellectual (*'aqlī*), customary (*'urfī*) and linguistic (*lughawī*) matters.³ Furthermore, *shar'i*, in this context is used in contradistinction to *hissi*, that is, matters which are perceptible to the senses and fall beyond the scope of *ijmā'*. Some 'ulamā' have confined *ijmā'* to religious, and others to *shar'i* matters, but the majority of 'ulamā' do not restrict *ijmā'* to either. Although the majority of jurists consider dogmatics (*'iṭiqādiyyāt*) to fall within the ambit of *ijmā'*, some have expressed the view that *ijmā'* may not be invoked in support of such subjects as the existence of God or the truth of the Prophethood of Muhammad. The reason for this is that such beliefs precede *ijmā'* itself. *Ijmā'* derives its validity from the *nuṣūṣ* on the infallibility (*'ismah*) of the *ummah*. These *nuṣūṣ*, in turn, take for granted the existence of God and the Prophethood of Muhammad. Now if one attempts to cite *ijmā'* in support of these dogmas, this would amount to circumlocution. To illustrate this point further, it may be said that the Qur'ān cannot be proved by the *Sunnah*, because the Qur'ān precedes the *Sunnah*.⁴ Matters of a practical type which do not partake of the nature of *tashrī'* (legislation) do not constitute the proper subject of *ijmā'*. For example, the agreement of the Companions to send out troops to Syria or to Persia, or their agreement on setting up certain government departments, etc., did not constitute *ijmā'*; for these were practical decisions that were valid in connection with particular circumstances and did not bind the succeeding generations of Muslims. *Ijmā'* on a *shar'i* ruling, on the other hand, has a quality of permanence and its validity is not confined by a time limit.⁵

Although the theory refuses to impose any restriction on the subject-matter of *ijmā'*, in actual terms the application of *ijmā'* is bound to be subject to some reservations. For example, *ijmā'* must have limited application in regard to rational and linguistic matters. To say that

lying is evil, or that 'hand' also means 'power', need not be supported by *ijmā'*. In actual terms, *ijmā'* has always been selective in determining its own subject-matter. It was perhaps in view of the dynamic nature of *ijmā'* and its infallibility that the 'ulamā' were persuaded not to impose any advance reservations on its scope.

It is clear from its definition that *ijmā'* can only occur after the demise of the Prophet. For during his lifetime, the Prophet alone was the highest authority on *Sharī'ah*, hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probability, *ijmā'* occurred for the first time among the Companions in the city of Medina. Following the demise of the Prophet, the Companions used to consult each other about the problems they encountered, and their collective agreement was accepted by the community. After the Companions, this leadership role passed on to the next generation, the Successors (*tābi'īn*) and then to the second generation of Successors. When these latter differed on a point, they naturally referred to the views and practices of the Companions and the Successors. In this way, a fertile ground was created for the development of the theory of *ijmā'*.⁶ The essence of *ijmā'* lies in the natural growth of ideas. It begins with the personal *ijtihād* of individual jurists and culminates in the universal acceptance of a particular opinion over a period of time. Differences of opinion are tolerated until a consensus emerges, and in the process there is no room for compulsion or the imposition of ideas upon the community.

Ijmā' plays a crucial role in the development of *Sharī'ah*. The existing body of *fiqh* is the product of a long process of *ijtihād* and *ijmā'*. Since *ijmā'* reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of *ijmā'* can never be expected to discontinue. The idea that *ijmā'* came to a halt after the first three generations following the advent of Islam seems to be a by-product of the phenomenon known as the closure of the gate of *ijtihād*. Since *ijmā'* originates in *ijtihād*, with the closure of the gate of *ijtihād*, it was expected that *ijmā'* also came to a close. This is, however, no more than a superficial equation, as in all probability *ijmā'* continued to play a role in consolidating and unifying the law after the supposed termination of *ijtihād*.⁷

Ijmā' ensures the correct interpretation of the Qur'ān, the faithful understanding and transmission of the *Sunnah*, and the legitimate use of *ijtihād*. The question as to whether the law, as contained in the divine sources, has been properly interpreted is always open to a

measure of uncertainty and doubt, especially in regard to the deduction of new rules by way of analogy and *ijtihād*. Only *ijmā'* can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. *Ijmā'* has primarily been regarded as the instrument of conservatism and of preserving the heritage of the past. This is obvious enough in the sense that whatever is accepted by the entire Muslim community as true and correct must be accepted as such. However, *ijmā'* is also an instrument of tolerance and of the evolution of ideas in such directions as may reflect the vision of the scholars in the light of the fresh educational and cultural achievements of the community. According to one observer, 'clearly this principle [i.e. *ijmā'*] provides Islam with a potential for freedom of movement and a capacity for evolution. It furnishes a desirable corrective against the dead letter of personal authority. It has proved itself, at least in the past, an outstanding factor in the adaptability of Islam.'⁸

Ijmā' enhances the authority of rules that are of speculative origin. Speculative rules do not carry a binding force, but once an *ijmā'* is held in their favour, they become definite and binding. Instances can be cited, for example, where the Companions have, by their *ijmā'*, upheld the ruling of a solitary *ḥadīth*. In such cases, the ruling in question is elevated to a binding rule of law. For example, the prohibition concerning unlawful conjunction, that is simultaneous marriage to the close relatives of one's wife, is a definitive ruling which is based on *ijmā'*, despite the fact that the basis of this *ijmā'* is a solitary *ḥadīth* – namely the *ḥadīth* that prohibits simultaneous marriage to the maternal or paternal aunt of one's wife. Similarly, the grandmother is entitled to a share in inheritance, and this is a *qaf'ī* ruling of *ijmā'* that is based on a solitary *ḥadīth*. The *ḥadīth* in question is reported by al-Mughīrah ibn Shu'bah to the effect that the Prophet assigned to the grandmother the portion of one-sixth. *Ijmā'* has also played a role in regard to *ḥadīth* that were not equally known to all the *mujtahidūn* especially during the period preceding the collection and compilation of *ḥadīth*. It was through *ijmā'* that some scholars were informed of the existence of certain *ḥadīth*.⁹

And lastly, *ijmā'* represents authority. Once an *ijmā'* is established it tends to become an authority in its own right, and its roots in the primary sources are gradually weakened or even lost. It then becomes common practice to quote the law without reference to the relevant sources. It is partly due to the significance of *ijmā'* that the incentive to quote the authority tends to weaken. This is, according to Shāh

Wali Allāh, one of the reasons that induced the jurists to recognise *ijmā'* as the third source of the *Sharī'ah*.¹⁰

II. The Essential Requirements (*Arkān*) of *Ijmā'*

Whenever an issue arises and attracts the attention of the *mujtahidūn* of the Muslim community at the time of its incidence, and they reach a unanimous agreement on its ruling, it is implied that the ruling so agreed upon is the correct and authoritative ruling of the *Sharī'ah*, provided that the following conditions are fulfilled.

(1) That there are a number of *mujtahidūn* available at the time when the issue is encountered, as consensus can never exist unless there is a plurality of concurrent opinion. Should there be a situation where a plurality of *mujtahidūn* could not be obtained, or when there is only a single *mujtahid* in the community, no *ijmā'* could be expected to materialise.

(2) According to the majority of 'ulamā', unanimity (*ittifāq*) is a prerequisite of *ijmā'*. All the *mujtahidūn*, regardless of their locality, race, colour and school or following, must reach a consensus on a juridical opinion at the time an issue arises. The presence of a dissenting view, even on the part of a small minority, precludes the possibility of *ijmā'*. If, for example, the *mujtahidūn* of Mecca and Medina, or those of Iraq, or the *mujtahidūn* of the family of the Prophet, or the Sunnī 'ulamā' without the agreement of their Shī'ī counterparts agree upon a ruling, no *ijmā'* will materialise. The majority of 'ulamā' maintain that lay opinion is not taken into account: in every field of learning, only the opinion of the learned is relevant to *ijmā'*. Al-Āmidī, however, prefers the minority view, attributed to Abū Bakr al-Baqillānī and others, to the effect that *ijmā'* includes the agreement of both the laymen and the *mujtahidūn*, the reason being that '*īsmāh*, which is the doctrinal basis of *ijmā'*, is a grace of God bestowed on the whole of the community. It would therefore be improper to turn the property of the entire community into a privilege of the *mujtahidūn*. The majority view is, however, based on the analysis that the *mujtahidūn*, in their capacity as the constituents of *ijmā'*, merely represent the community, and therefore no change is proposed in the original locus of '*īsmāh*'.¹¹

(3) The agreement of the *mujtahidūn* must be demonstrated by their expressed opinion on a particular issue. This may be verbal or in writing, such as by giving a *fatwā* in either of these forms, or it may be actual, when, for example, a judge adjudicates the issue in question;

or it may be that every *muftahid* expresses an opinion and, after gathering their views, they are found to be in agreement. Similarly, the *muftahidūn* may give their views collectively when, for example, the *muftahidūn* of the Muslim world assemble at the time an issue is encountered and reach a consensus over its ruling.

(4) As a corollary of the second condition above, *ijmā'* consists of the agreement of all the *muftahidūn*, and not a mere majority among them; for so long as a dissenting opinion exists, there is the possibility that one side is in error, and no *ijmā'* can be envisaged in that situation, for *ijmā'* is a decisive proof that must be founded on certainty. However, according to Ibn Jarīr al-Ṭabarī, Abū Bakr al-Rāzī, one of the two views of Ahmad ibn Ḥanbal and Shāh Walī Allāh, *ijmā'* may be concluded by a majority opinion. But al-Āmidī prefers the majority view on this point, which requires the participation of all *muftahidūn*.¹²

Ijmā' must also fulfil three conditions (*shurūṭ*) which are as follows.

(1) The *muftahidūn* who participate in *ijmā'* must qualify as upright individuals, and the minimum of this requirement is that they are admissible as witnesses in the courts of justice. (2) The constituents of *ijmā'* are clear of pernicious innovation (*bid'ah*) and heresy. If the *bid'ah* is one that casts doubt on the faith of its advocator and renders him a non-Muslim, he is disqualified. Even a lesser degree of misguided *bid'ah* which is actively pursued by inviting others to embrace it disqualifies the *muftahid* from the ranks of *ijmā'*. This was the reason why the opposition of the Rawafid Shī'ah was not given any credit in the title to leadership of the first two caliphs, nor to that of the Khārijites in regard to the imamate of 'Alī. (3) The constituents of *ijmā'* are qualified to carry out *ijtihād*, especially when the issue requires specialised knowledge in particular areas of *Sharī'ah*. They must, in other words, be able to form a considered opinion on the matter.

Then there are conditions that are the subject of disagreement among the 'ulamā', and they include: (1) that only the *muftahidūn* among the Companions qualify. The majority has rejected this; (2) that the constituents of *ijmā'* belong to the family of the Prophet; (3) that the participants of *ijmā'* have all passed away; (4) that they are residents of Medina; (5) that *ijmā'* does not proceed on a matter on which the earlier 'ulamā' (*al-salaf*) were in disagreement. This last condition, which is held by some Shāfi'is and the Ahl al-Ḥadīth, is also rejected by the *jumhūr*.¹³

In regard to the rules of *fiqh*, it is the *ijmā'* of the *fuqahā'* alone that

is taken into account.¹⁴ According to the majority view, if a *faqīh* is known to have actively invited the people to *bid'ah*, he is excluded from *ijmā'*, otherwise he is included in the ranks of *ahl al-ijmā'*.¹⁵ The Hanafīs preclude a transgressor (*fāsiq*) and one who does not act upon his doctrine from being among the *ahl al-ijmā'*, whereas the Shāfi'is and some Mālikīs maintain that a mere transgression is no disqualification.¹⁶ Some *fuqahā'* have held that *ijmā'* is concluded only with the disappearance of the generation (*inqirāḍ al-'aṣr*), that is, when the *muftahidūn* who took part in it have all passed away. For if any one of them were known to be alive, there would still be a possibility that he might change his view, in which case the *ijmā'* would collapse. A corollary of this rule is that *ijmā'* is retrospective, in that it only binds succeeding generations but not its own constituents.¹⁷

The majority of jurists, however, maintain that this is not a condition of *ijmā'* and that *ijmā'* not only binds the next generation but also its own participants, as it would only be reasonable to expect that if *ijmā'* did not bind its participants, it should not bind anyone else either.¹⁸ With regard to the tacit *ijmā'* (for which see below), too, some jurists have held that it is concluded only after the death of its participants, so that it can be established that none of them have subsequently expressed an opinion; for when they break their silence they will no longer be regarded as silent participants, and may even turn a tacit *ijmā'* into an explicit one.

The majority of 'ulamā', nevertheless, refuse to attach any importance to the 'disappearance of the generation', for in view of the overlapping of generations (*tadākḥul al-'aṣār*), it is impossible to distinguish the end of one generation from the beginning of the next. Thus the period of the Companions cannot be clearly distinguished from that of the Successors, nor can any other period be so distinguished from its preceding or succeeding generations.¹⁹ However, al-Ghazālī has, to all intents and purposes, resolved this question by stating that 'for the formation of *ijmā'*, it is enough that agreement should have taken place, even if only for an instant'.²⁰

When *ijmā'* fulfils the foregoing requirements, it becomes binding (*uājib*) on everyone. Consequently, the *muftahidūn* of a subsequent age are no longer at liberty to exercise fresh *ijtihād* on the same issue for, once it is concluded, *ijmā'* is not open to amendment or abrogation (*naskh*). The rules of *naskh* are not relevant to *ijmā'* in the sense that *ijmā'* can neither repeal nor be repealed. This is the majority view, although some jurists have stated that the constituents of *ijmā'* themselves are entitled to repeal their own *ijmā'* and to enact another

one in its place. But once an *ijmā'* is finalised, especially when all of its constituents have passed away, no further *ijmā'* may be concluded on the same subject. Should there be a second *ijmā'* on the same point, it will be of no account.²¹

III. The Proof (*Hujjiyyah*) of *Ijmā'*

What proof is there that *ijmā'* is a source of law? The '*ulamā'*' have sought to justify *ijmā'* on the authority of the Qur'ān, the *Sunnah*, and reason. We shall presently discuss the *āyāt* and *ḥadīth* that have been quoted in support of *ijmā'*. It should be noted at the outset, however, that the '*ulamā'*' have on the whole maintained the impression that the textual evidence in support of *ijmā'* does not amount to conclusive proof. Having said this, one might add that both al-Ghazālī and al-Amīdī are of the view that when compared to the Qur'ān, the *Sunnah* provides a stronger argument in favour of *ijmā'*.²²

III.1 *Ijmā'* in the Qur'ān

The Qur'ān (al-Nisā', 4:59) is explicit on the requirement of obedience to God, to His Messenger, and 'those who are in charge of affairs', the *ūlū al-amr*.²³ It is also suggested that this *āyah* lends support to the infallibility of *ijmā'*. According to al-Fakhr al-Rāzī, since God has commanded obedience to the *ūlū al-amr*, the judgement of the *ūlū al-amr* must therefore be immune to error, for God cannot command obedience to anyone who is liable to committing errors.²⁴ The word '*amr*' in this context is general and thus includes both secular and religious affairs. The former is discharged by the political rulers, whereas the latter is discharged by the '*ulamā'*'. According to a commentary attributed to Ibn 'Abbās, *ūlū al-amr* in this *āyah* refers to '*ulamā'*', whereas other commentators have considered it to be a reference to the *umārā'*, that is, 'rulers and commanders'. The *ẓāhir* of the text includes both, and enjoins obedience to each in their respective spheres. Hence, when the *ūlū al-amr* in juridical matters, namely the *muftahidūn*, reach a consensus on a ruling, it must be obeyed.²⁵ Further support for this conclusion can be found elsewhere in *sūra al-Nisā'* (4:83) which once again confirms the authority of the *ūlū al-amr* next to the Prophet himself.²⁶

The one *āyah* most frequently quoted in support of *ijmā'* occurs in *sūra al-Nisā'* (4:115), and is as follows:

And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers, We shall leave him in the path he has chosen, and land him in Hell. What an evil refuge!

ومن يشاقق الرسول من بعد ما تبين له الهدى ويتبع غير
سبيل المؤمنين نوله ما تولى ونصله جهنم وساءت مصيرا

The commentators observe that 'the way of the believers' in this *āyah* refers to their 'agreement and the way that they have chosen', in other words, to their consensus. Adherence to the way of the community is thus binding, and departure from it is forbidden. Departing from the believers' way has been approximated to disobeying the Prophet, both of which are forbidden. There are several points that the commentators have emphasised concerning this *āyah*. However, before elaborating further, a brief discussion of the other Qur'ānic passages quoted in support of consensus would be useful.

The Qur'ān is expressive of the dignified status that God has bestowed on the Muslim community. Thus we read in *sūra Al-Imrān* (3:110): 'You are the best community that has been raised for mankind. You enjoin right and forbid evil and you believe in God.'

كنتم خير أمة أخرجت للناس تأمرون بالمعروف وتنهون
عن المنكر وتؤمنون بالله

This *āyah* attests to some of the outstanding merits of the Muslim community. It is thus argued that had the community been capable of agreeing on an error, the Qur'ān would not have praised it in such terms. It is further noted that the contents of this *āyah* give some indication of the meaning of the phrase 'the believers' way'.

On the same theme, we read in *sūra al-Baqarah* (2:143): 'Thus We have made you a middle nation, that you may be witnesses over mankind.'

وكذلك جعلناكم أمة وسطا لتكونوا شهداء على الناس

Literally, *wasaf* means 'middle', implying justice and balance, qualities which merit recognition of the agreed decision of the community and the rectitude of its way. Furthermore, it is by virtue of uprightness that God has bestowed upon the Muslim community the merit

of being a 'witness over mankind'.²⁷ In yet another reference to the *ummah*, the Qur'an proclaims in sūra al-A'rāf (7:181): 'And of those We created are a nation who direct others with truth and dispense justice on its basis.'

وَمِنْ خَلْقِنَا أُمَّةٌ يَهْدُونَ بِالْحَقِّ وَبِهِ يَعْدِلُونَ

There are three other *āyāt* that need to be quoted. These are: 'Clinging firmly together to God's rope and do not separate (Āl 'Imrān, 3:103).

وَاعْتَصِمُوا بِحَبْلِ اللَّهِ جَمِيعًا وَلَا تَفَرَّقُوا

This *āyah* obviously forbids separation (*tafarruq*). Since opposition to the *ijmā'* is a form of *tafarruq*, it is therefore prohibited.²⁸ 'And in whatever you differ, the judgement remains with God' (al-Shūrā, 42:10)

وَمَا اخْتَلَفْتُمْ فِيهِ مِنْ شَيْءٍ فَحُكْمُهُ إِلَى اللَّهِ

which implicitly approves that on which the community is in agreement;²⁹ and 'Then if you dispute over something, refer it to God and the Messenger' (al-Nisā', 4:59).

فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ

By implication (i.e. divergent implication – *mafhūm al-mukhālafah*), this *āyah* too upholds the authority of all that is agreed upon by the community.³⁰

Having quoted all the foregoing *āyāt*, al-Ghazālī observes that 'all of these are apparent indications [*ẓawāhir*] none of which amounts to a clear *nāṣṣ* on the subject of *ijmā'*'. Al-Ghazālī adds that of all these, *āyah* 4:113 is closest to the point. For it renders adherence to the 'believers' way' an obligation. Al-Shāfi'i has also quoted it, and has drawn the conclusion that it provides clear authority for *ijmā'*. According to him, following a way other than that of the believers is *harām*, and following the believers' way is *wājib*.³¹ Despite this, al-Ghazālī explains that the main theme of this *āyah* is a warning against disobedience to the Prophet and hostility against the believers. It requires the believers to give the Prophet active support and defend him against enemies. It is not enough for a believer merely to avoid causing hardship (*mushaqqah*) to the Prophet; he must actively help

him and obey all his commands and prohibitions. This is the main theme of the *āyah*. The Prophet himself has not given it a specific interpretation to warrant a departure from its manifest (*ẓāhir*) meaning. The Prophet, in other words, has not made any reference to *ijmā'* in this context. From this analysis, it would appear that al-Ghazālī does not agree with the conclusion al-Shāfi'i has drawn from this *āyah*.

Jalāl al-Dīn al-Suyūṭī's interpretation of the same *āyah* is broadly in line with what al-Ghazālī had to say. There is no indication in al-Suyūṭī's *Tafsīr al-Jalālayn* that this *āyah* provides an explicit authority for *ijmā'*. 'Following a path other than that of the believers', according to both al-Suyūṭī and al-Shawkānī, means abandoning Islam. Al-Shawkānī adds: 'A number of 'ulamā' have drawn the conclusion that this *āyah* provides the authority for *ijmā'*. But this is an unwarranted conclusion, as following a way other than that of the believers means unbelief, that is, renouncing Islam in favour of another religion.' Al-Shawkānī further suggests that the occasion of revelation (*sha'n al-nuzūl*) of this *āyah* relates to the context of apostasy. It is reported that one Tu'mah ibn Ubayraq had accused a Jew of a theft which Tu'mah had committed himself. As a result of the revelation of this *āyah*, the Jew was cleared of the charge but Tu'mah himself renounced Islam and fled to Mecca.³²

Muhammad 'Abduh and his disciple, Rashīd Riḍā, have observed that the *āyah* under discussion was revealed concerning the 'way of the believers' during the lifetime of the Prophet, and its application must be confined to that period. For hostility toward the Prophet was only possible when he was alive. 'Abduh further remarks that to quote this *āyah* in support of *ijmā'* leads to irrational conclusions, for it would amount to drawing a parallel between those who are threatened with the punishment of Hell and a *mujaḥid* who differs with the opinion of others. A *mujaḥid*, even when he takes an exception to the prevalent opinion, or to the path followed by other *mujaḥidūn*, is still a Muslim, and even merits a reward for his efforts. 'Abduh concludes that the *sha'n al-nuzūl* of this *āyah* does not lend support to the conclusion that al-Shāfi'i has drawn from it.³³

It is further suggested that the threat in the *āyah* under discussion is primarily concerned with the first part of the *āyah*, namely disobeying the Prophet, and not necessarily with the second. Hence divergence from the believers' way is lawful in the absence of opposition to the Prophet. The validity of this critique is, however, disputed, as the

āyah itself does not distinguish between the two parts as such, and therefore the threat applies equally to both.³⁴

Al-Āmidī discusses the Qur'ānic *āyāt* concerning *ijmā'*, and concludes that they may give rise to a probability (*ẓann*) but they do not impart positive knowledge. If we assume that *ijmā'* is a decisive proof, then establishing its authority on the basis of speculative evidence is not enough. Speculative evidence would suffice only if *ijmā'* were deemed to be a speculative doctrine, which is not the case.³⁵

III.2 The *Sunnah* on *Ijmā'*

The *ḥadīth* which is most frequently quoted in support of *ijmā'* reads: 'My community shall never agree on an error.'³⁶

لا تجتمع أمتي على الضلالة.

The last word in this *ḥadīth*, namely *al-dalālah*, is rendered in some reports as *al-khaṭa'*. The jurists have used the two words interchangeably, but in the classical *ḥadīth* collections this *ḥadīth* has been recorded with the word *al-dalālah*.³⁷ Al-Ghazālī has pointed out that this *ḥadīth* is not *mutawāṭir* and as such, it is not an absolute authority like the Qur'ān. The Qur'ān on the other hand is *mutawāṭir* but contains no *naṣṣ* on *ijmā'*. Having said this, however, al-Ghazālī adds that a number of prominent Companions have reported *ḥadīth* from the Prophet, which although different in their wording, are all in consonance on the theme of the infallibility of the community and its immunity from error.³⁸ Leading figures among the Companions such as 'Umar ibn al-Khaṭṭāb, 'Abd Allāh ibn Mas'ūd, Anas ibn Mālik, 'Abd Allāh ibn 'Umar, Abū Sa'īd al-Khudrī, Abū Hurayrah, Ḥudhayfah and others have reported *ḥadīth* which include the following:

My community shall never agree upon an error.

لا تجتمع أمتي على الخطأ.

God will not let my community agree upon an error.

لم يكن الله ليجمع أمتي على الضلالة.

I beseeched Almighty God not to bring my community to the point of agreeing on *dalālah* and He granted me this.

سألت الله تعالى ألا يجمع أمتي على الضلالة فأعطانيها.

Those who seek the joy of residing in Paradise will follow the community, for Satan can chase an individual but he stands farther away from two people.

من سره أن يسكن بمجوعة الجنة فليلزم الجماعة، إن الشيطان مع الفرد وهو من الاثنين أبعد.

The hand of God is with the community and [its safety] is not endangered by isolated oppositions.

يد الله مع الجماعة، ولا يوالي بشلوذ من شذ.

Whoever leaves the community or separates himself from it by the length of a span is breaking his bond with Islam.

من خرج من الجماعة أو فارق الجماعة قيد شبر فقد خلع ربة الإسلام من عنقه.

A group of my *ummah* shall continue to remain on the right path. They will be the dominant force and will not be harmed by the opposition of opponents.

لا تزال طائفة من أمتي على الحق ظاهرين لا يضرهم من خالفهم.

Whoever separates himself from the community and dies, dies the death of ignorance.

من فارق الجماعة ومات فميتته جاهلية.

And finally, the well-known saying of 'Abd Allāh ibn Mas'ūd which is as follows: 'Whatever the Muslims deem to be good is good in the eyes of God.'³⁹

ما رآه المسلمون حسنا فهو عند الله حسن.

Having quoted these (and other) *ḥadīth*, both al-Ghazālī and al-Āmidī observe that their main theme and purport has not been opposed by the Companions, the Successors and others throughout the ages, and that everyone has agreed on their broad outline. The '*ulamā'* have

continued to rely on them in their exposition of the general and detailed rules of the *Sharī'ah*. In answer to the point that all these are solitary (*āḥād*) reports which do not amount to a definitive proof, the same authors observe that the main purport of these *ḥadīth* nevertheless conveys positive knowledge, and that the infallibility of the *ummah* is sustained by their collective weight.⁴⁰ The point may be illustrated by saying that we know the courage of 'Alī, the generosity of Ḥatīm, the erudition of al-Shāfi'ī in *fiqh*, and the esteem in which the Prophet held his Companions, despite the absence of *mutawātir* reports on these subjects. Although the foregoing *ḥadīth* are all *āḥād* and could be subjected to doubt if taken individually, their collective import may, nevertheless, not be denied.⁴¹

As to the question whether '*ḡalālāh*' and '*khaṭa*' in these *ḥadīth* (especially in the first four) could mean disbelief (*kufī*) and heresy (*biḡ'ah*) with the view that the Prophet might have meant that his community shall not fall into disbelief, it is observed that *khaṭa*' is general and could include *kufī* but that *ḡalālāh* does not, for *ḡalālāh* only means an error or erroneous conduct.⁴² If *ḡalālāh* meant disbelief, then the *āḥādīth* under discussion would fail to provide an authority for the infallibility of the *ummah*; but if it meant an error only, then they could provide such authority.⁴³

It is further observed that the article '*lā*' in the *ḥadīth* under discussion could either imply negation (*naḡy*) or prohibition (*nahy*). If the latter, it would simply prohibit the people from deviation, and as such the *ḥadīth* could not sustain the notion of infallibility for the *ummah*.⁴⁴ According to another observer, the manifest (*ẓāhir*) meaning of the *ḥadīth* is that the *ummah* abstains from a collective agreement on an error. The *ḥadīth*, in other words, precludes a general agreement on an error, but not the error itself. These are some of the doubts which have been expressed concerning the precise meaning of the *ḥadīth*. They may or may not be correct, but so long as the *ḥadīth* is open to such doubts, it cannot provide a decisive proof (*dalīl qaṭ'ī*) for *ijmā'*.⁴⁵ Muḥammad 'Abduh has observed that the *ḥadīth* in question does not speak of *ijmā'* at all, nor does it sustain the notion of infallibility for the community. It is an exaggerated claim to read *ijmā'* into this *ḥadīth* regardless of whether reference is made to the agreement of the jurists or to that of the community at large.⁴⁶

It is further suggested that some of the foregoing *ḥadīth* simply encourage fraternity and love among the members of the community, and, as such, do not envisage the notion of *ijmā'* as a source of law. As for *ḥadīth* number seven, although al-Ghazālī quotes it, it is not

relevant to *ijmā'*, as it obviously means that a group of the *ummah* shall remain on the right path, not the *ummah* as a whole. The Shī'ah Imamiyyah have quoted this *ḥadīth* in support of their doctrine of the *ijmā'* of *ahl al-bayt*, which refers to the members of the family of the Prophet.⁴⁷

The word '*ummah*' (or *jamā'ah*) in the foregoing *ḥadīth* means, according to one view, the overwhelming majority of Muslims. This view is supported in a number of statements from the Companions. According to another view, *jamā'ah* refers to the scholars of the community only. The masses, it is argued, look up to the scholars from whom they acquire knowledge of law and religion, and it is the latter whose consensus is referred to in the relevant *ḥadīth*. According to yet another opinion, *ummah* (and *jamā'ah*) refers only to the Companions, who are the founding fathers of the Muslim community. According to this interpretation, *ummah* and *jamā'ah* in all the foregoing *ḥadīth* refer to the Companions only.⁴⁸

And finally, *ummah* and *jamā'ah* refer to the whole of the Muslim community and not to a particular section thereof. The grace of '*isṡmah*', according to this view, is endowed on the whole of the community without any reservation or specification. This is the view of al-Shāfi'ī, who wrote in his *Risālah*: 'And we know that the people at large cannot agree on an error or on what may contradict the *Sunnah* of the Prophet.'⁴⁹

Having discussed the *ḥadīth* relating to *ijmā'*, Aḥmad Ḥasan observes that they are inconclusive. All of them emphasise unity and integration. Some of them are predictive and others circumstantial: 'They may mean *ijmā'*, or something else.' Hence the argument that they provide the authority for *ijmā'* is 'definitely subjective'. The same author elaborates that: (1) there was no idea of *ijmā'* as a doctrine of jurisprudence in the early period; (2) the jurists could not determine a definite meaning for '*ummah*' or '*jamā'ah*'; and (3) *ḥadīth* which convey a general meaning should not be restricted to a particular point of view.⁵⁰

Notwithstanding the doubts and uncertainties in the *nuṡūṡ*, the majority of '*ulamā'*' have concluded that the consensus of all the *mujtahidīn* on a particular ruling is a sure indication that the word of truth has prevailed over their differences; that it is due to the strength of that truth that they have reached a consensus. This rational argument in support of *ijmā'* has been further advanced to the effect that consensus upon a *shar'ī* ruling is bound to be founded on sound *ijtihād*. In exercising *ijtihād*, the *mujtahid* is normally guided by certain

rules and guidelines. *Ijtihād* often consists of an interpretation of the *naṣṣ*, or of a rational extension of its ruling. Even in the absence of a *naṣṣ*, *ijtihad* still observes both the letter and spirit of the sources that the *mujtahid* has mastered through his general knowledge. Since *ijtihad* is founded on sound authority in the first place, the unanimous agreement of all the *mujtahidūn* on a particular ruling indicates that there is clear authority in the *Sharī'ah* to sustain their consensus. In the event of this authority being weak or speculative, we can only expect disagreement (*ikhtilāf*), which would automatically preclude consensus. *Ijmā'*, in other words, accounts for its own authority.

IV. The Feasibility of *Ijmā'*

A number of 'ulamā', including the Mu'tazili leader Ibrāhīm al-Nazzām and some Shi'ī 'ulamā', have held that *ijmā'* in the way defined by the *jumhūr* 'ulamā' is not feasible. To ascertain the consensus of the 'ulamā' on any matter that is not obvious is just as impossible as their unanimity at any given moment on what they utter and what they eat.³¹ It may be possible to ascertain the broad outline of an agreement among the *mujtahidūn* on a particular matter, but to say that their consensus could be ascertained in such a way as to impart positive knowledge is not feasible. Since the *mujtahidūn* would normally be located in distant places, cities and continents, access to all of them and obtaining their views is beyond the bounds of practicality. Difficulties are also encountered in distinguishing a *mujtahid* from a non-*mujtahid*. Since it is the *mujtahidūn* whose consensus constitutes *ijmā'*, one must be able to identify them with certainty. Apart from the absence of clear criteria concerning the attributes of a *mujtahid*, there are some among them who have not achieved fame. Even granting that they could be known and numbered, there is still no guarantee to ensure that the *mujtahid* who gives an opinion will not change it before an *ijmā'* is reached. So long as this is possible, no *ijmā'* can be realised, for it is a condition of *ijmā'* that all the *mujtahidūn* be simultaneously in agreement.³² It is mainly due to these reasons that al-Shāfi'ī confines the occurrence of *ijmā'* to the obligatory duties alone, as he considers that, on matters other than these, *ijmā'* was not a realistic proposition.³³

It is due partly to their concern over the feasibility of *ijmā'* that according to the Zāhirīs and Imam Aḥmad ibn Ḥanbal *ijmā'* refers to the consensus of the Companions alone. This is also the view of the Khārijites, albeit for them *ijmā'* is a proof if concluded before the split

and *fitnah* that followed the murder of the Caliph Uthmān. Imam Mālik, on the other hand, confines *ijmā'* to the people of Medina, and the Shi'āh Imamiyyah recognise only the agreement of the members of the Prophet's family (*ahl al-bayt*). In Shi'ī jurisprudence, *ijmā'* is inextricably linked with the *Sunnah*, for the agreement of the *ahl al-bayt* (that is, their recognised imams), automatically becomes an integral part of the *Sunnah*. 'In the Shi'ite view', as Muṭahhari explains, 'consensus goes back to the *Sunnah* of the Prophet...Consensus is not genuinely binding in its own right, rather it is binding inasmuch as it is a means of discovering the *Sunnah*.'³⁴ If there is any recognition of *ijmā'* in the Shi'ī doctrine, it is not because of the consensus as such but because it comprises, as indeed it must, the ruling of the infallible Imam. What the Imam rules is a proof in its own right independently of *ijmā'*, for he is the head and the leader of the *ummah*. No *ijmā'* can materialise in the absence of the Imam. In support of their argument that *ijmā'* is confined to the *ahl al-bayt*, the Shi'ī 'ulamā' have referred to the Qur'ān (al-Aḥzāb 33:33): 'God wishes to cleanse you, the people of the house [of the Prophet], of impurities.'

إِنَّمَا يُرِيدُ اللَّهُ لِيُذْهِبَ عَنْكُمُ الرِّجْسَ أَهْلَ الْبَيْتِ

The Shi'ī doctrine also relies on the *ḥadīth* in which the Prophet is reported to have said, 'I am leaving among you two weighty things which, if you hold by them, you will not go astray: The Book of God and my family.'

إِنِّي تَارِكٌ فِيكُمْ ثَقَلَيْنِ فَإِنْ تَمَسَّكْتُمْ بِهِمَا لَنْ تَضَلُّوا:

كِتَابُ اللَّهِ وَعَرَّتِي

The reference in this *ḥadīth*, according to its Shi'ī interpreters, is to 'Alī, Fāṭima, Hasan and Husayn. The Sunnis have maintained, however, that the *āyah* in sūra al-Aḥzāb was revealed regarding the wives of the Prophet and that the context in which it was revealed is different. Similarly, while quoting the foregoing *Ḥadīth*, al-Āmidī observes: 'Doubtless the *ahl al-bayt* enjoy a dignified status, but dignity and descent are not necessarily the criteria of one's ability to carry out *ijtihad*.'³⁵

There is yet another argument to suggest that *ijmā'* is neither possible nor, in fact, necessary. Since *ijmā'* is founded on *ijtihad*, the *mujtahid* must rely on an indication (*dalīl*) in the sources which is

either decisive (*qaf'i*) or speculative (*ẓannī*). If the former is the case, the community is bound to know of it, for a decisive indication in the *nuṣūṣ* could not remain hidden from the entire community. Hence there would be no need for *ijmā'* to substantiate the *naṣṣ* or to make it known to the people. Furthermore, when there is *qaf'i* indication, then that itself is the authority, in which case *ijmā'* would be redundant.⁵⁶ *Ijmā'*, in other words, can add nothing to the authority of a decisive *naṣṣ*. But if the indication in the *naṣṣ* happens to be speculative, then once again there will be no case for *ijmā'*: a speculative indication can only give rise to *ikhtilāf*, not *ijmā'*.⁵⁷

According to a report, 'Abd Allāh ibn Ahmad ibn Hanbal quoted his father to have said: 'It is no more than a lie for any man to claim the existence of *ijmā'*. Whoever claims *ijmā'* is telling a lie.'⁵⁸ The *jumhūr* 'ulamā', however, maintain that *ijmā'* is possible and has occurred in the past, adding that those who deny it are only casting doubt on the possibility of something that has occurred. Note, for example, the *ijmā'* of the Companions on the exclusion of the son's son from inheritance, when there is a son; and their *ijmā'* on the rule that land in the conquered territories may not be distributed to the conquerors; or their ruling that half-brothers are counted as full brothers in the absence of the latter.⁵⁹ This last rule is based on a *ḥadīth* in which the Prophet counted them both as brothers without distinguishing one from the other.⁶⁰ The *ijmā'* that is recorded on these issues became standard practice during the period of the first four caliphs, who often consulted the Companions and announced their collective decisions in public.⁶¹

'Abd al-Wahhāb Khallāf is of the view that *ijmā'* in accordance with its classical definition is not feasible in modern times. Khallāf adds that it is unlikely that *ijmā'* could be effectively utilised if it is left to Muslim individuals and communities without there being a measure of government intervention. But *ijmā'* could be feasible if it were to be facilitated by the ruling authorities. The government in every Muslim country could, for example, specify certain conditions for attainment to the rank of *muftahid*, and make this contingent upon obtaining a recognised certificate. This would enable every government to identify the *muftahidūn* and to verify their views when the occasion so required. When the views of all the *muftahidūn* throughout the Islamic lands concur upon a ruling concerning an issue, this becomes *ijmā'*, and the ruling so arrived at becomes a binding *ḥukm* of the *Sharī'ah* upon all the Muslims of the world.⁶²

The question is once again asked whether the classical definition

of *ijmā'* has ever been fulfilled at any period following the demise of the Prophet. Khallāf answers this question in the negative, although some 'ulamā' maintain that the *ijmā'* of the Companions did fulfil these requirements. Khallāf observes that anyone who scrutinises events during the period of the Companions will note that their *ijmā'* consisted of the agreement of the learned among them who were present at the time when an issue was deliberated, and the ruling that followed was a collective decision of the *shūrā*. When the Caliph Abū Bakr could not find the necessary guidance for settling a dispute in the Qur'an or the *Sunnah*, he would convene the community leaders for consultation, and if they agreed on an opinion, he would act upon it. The community leaders so convened did not include everyone; many were, in fact, on duty in Mecca, Syria, the Yemen, etc. There is nothing in the reports to suggest that Abū Bakr postponed the settlement of disputes until a time when all the *muftahidūn* of the age in different cities reached an agreement. He would instead act on the collective decision of those who were present. The practice of 'Umar ibn al-Khaṭṭāb corresponded with that of his predecessor, and this is what the *fuqahā'* have referred to as *ijmā'*. This form of *ijmā'* was only practised during the period of the Companions, and intermittently under the Umayyads in al-Andalus when in the second Islamic century they set up a council of 'ulamā' for consultation in legislative affairs (*tashrī'*). References are found, in the works of some 'ulamā' of al-Andalus, to the effect that so-and-so was a 'learned member' of the council.

With the exception of these periods in the history of Islam, no collective *ijmā'* is known to have taken place on any juridical matter. The *muftahidūn* were engaged in their juridical activities as individuals, whose views either agreed or disagreed with those of the other *muftahidūn*. The most that a particular *muftahid* was able to say on any particular matter was that 'no disagreement is known to exist on the *ḥukm* of this or that incident'.⁶³

Zakī al-Dīn Sha'bān and Shaykh al-Khudarī addressed some of the issues regarding *ijmā'* and observed the following. With regard to the difficulty in identifying the *muftahidūn*, it is stated that the era of the Companions can be divided into two periods, that is the period of the first two caliphs ('*asr al-shaykhayn*') and that of the other two caliphs, 'Uthmān and 'Alī. The number of *muftahidūn* in the first period was relatively small and could be easily identified, but *ijmā'* became difficult during the second period as the *muftahidūn* among the Companions began to reside in distant places, and matters were

further complicated as a result of political controversies and dissension that became prevalent. *Ijmā'* became difficult in this period and yet remained feasible in principle and did take place.

As for the point that the underlying basis (*sanad*) of *ijmā'* is either definitive or speculative, and that *ijmā'* is basically redundant in both cases, Shā'bān observes that this is not so. *Ijmā'* still serves a purpose, in the former situation, by providing reassurance and preventing disagreement for, after all, the ruling of the underlying *sanad* may not be well-known to everyone. Note, for example, that 'Umar ibn al-Khaṭṭāb was either unaware or oblivious of the Qur'ānic ruling on dower (*mahr*) when a woman member of the audience where he spoke drew his attention to the relevant *āyah* on the subject. And secondly, when the *sanad* of *ijmā'* is speculative, such as a ruling of *qiyās* or the *āḥād ḥadīth*, *ijmā'* is still possible and serves an eminently useful purpose in elevating the speculative evidence to a definitive ruling of the *Shari'ah*. Many examples can be given of *āḥād ḥadīth* that have been supported by consensus and the ruling therein consequently became definitive.⁶⁴

V. Types of *Ijmā'*

From the viewpoint of the manner of its occurrence, *ijmā'* is divided into two types; explicit *ijmā'* (*al-ijmā' al-ṣarīḥ*), in which every *mujtahid* expresses his opinion either verbally or by an action; and tacit *ijmā'* (*al-ijmā' al-sukūṭī*), whereby some of the *mujtahidūn* of a particular age give an expressed opinion concerning an incident while the rest remain silent.

According to the *junhūr 'ulamā'*, explicit *ijmā'* is definitive and binding; it is unlawful to violate it and once properly concluded, there remains no room for disagreement and *ijtihād*. Explicit *ijmā'* can either be verbal (*qawli*) or actual (*fi'lī*). In the former, the participants of *ijmā'* declare their views clearly, either verbally or in writing, after deliberation, and reach a consensus on a ruling. In the case of actual *ijmā'*, the *mujtahidūn* show their consensus in their affirmative action or abandonment of something. Verbal *ijmā'* is generally considered to be stronger than actual *ijmā'*. This is because action can either imply certainty or mere probability, which may accordingly downgrade an *ijmā'* from a binding *ijmā'* to one that is merely recommended. The Mu'tazili Ibrāhīm al-Nazzām and some Khārijites and Shī'ī have held that *ijmā'*, whether explicit or otherwise, is not a proof. Tacit *ijmā'* in particular is a presumptive *ijmā'* which only

creates a probability (*ẓann*) but does not preclude the possibility of fresh *ijtihād* on the same issue. Since tacit *ijmā'* does not imply the definite agreement of all its participants, the '*ulamā'*' have differed on its authority as a proof. The majority of '*ulamā'*', including al-Shāfi'i, Abū Bakr al-Baqillāni, and some Hanafis such as 'Isa ibn Abān and the Mālikis have held that it is not a proof and that it does not amount to more than the view of some individual *mujtahidūn*. But the Hanafis and Imam Ahmad ibn Hanbal have considered tacit *ijmā'* to be a proof, provided it is established that the *mujtahid* who has remained silent had known of the opinion of other *mujtahidūn* but then, having had ample time to investigate and to express an opinion, still chose to remain silent. If it is not known that the silence was due to fear or *taqiyyah* (hiding one's true opinion), or wariness of inviting disfavour and ridicule, then the silence of a *mujtahid* on an occasion where he ought to express an opinion when there was nothing to stop him from doing so, would be considered tantamount to agreeing with the existing opinion.⁶⁵

The proponents of tacit *ijmā'* have further pointed out that explicit agreement or open speech by all the *mujtahidūn* concerning an issue is neither customary nor possible. In every age, it is the usual practice that the leading '*ulamā'*' give an opinion which is often accepted by others. Suppose that the entire *ummah* gathered in one place and shouted all at once saying that, 'we agree on such-and-such'. Even if this were possible, it would still not impart positive knowledge. For some of them might have remained silent due to fear, uncertainty or *taqiyyah*.⁶⁶

Further, the Hanafis draw a distinction between the 'concession' (*rukhsah*) and 'strict rule' ('*azimah*'), and consider tacit *ijmā'* to be valid only with regard to the former. In order to establish a strict rule, *ijmā'* must be definitely stated or expressed by an act. The Hanafis are alone in validating tacit *ijmā'*. The Zāhiris refuse it altogether, while some Shāfi'is like al-Juwaynī, al-Ghazālī and al-Āmidī allow it with certain reservations. 'It is *ijmā'*', al-Ghazālī tells us, 'provided that the tacit agreement is accompanied by indications of approval on the part of those who are silent'.⁶⁷ As already indicated, in order to qualify as valid proof, tacit *ijmā'* must fulfil the following six conditions: 1) the *mujtahid* knows the issue under deliberation; 2) sufficient time is given for investigation; 3) the issue is an *ijtihād* issue; 4) the issue arose prior to the establishment of the *madhāhib*, for otherwise the silence of a *mujtahid* may not necessarily imply his agreement but may be in deference to the position of the *madhhab* he follows; 5) that silence is

not due to any fear or favour of the ruling authorities; and 6) that silence is not a definitive sign of either agreement or disagreement, as the former will fall under explicit *ijmā'*, and the latter will fail to qualify at all.⁶⁸

The majority opinion on this matter is considered to be preferable. For the silence of a *mujtahid* could be due to a variety of factors, and it would be arbitrary to lump them all together and say that silence definitely indicates consent. But despite the controversy it has aroused, tacit *ijmā'* is by no means an exceptional case. On the contrary, it is suggested that most of what is known by the name of *ijmā'* falls under this category.⁶⁹

From the viewpoint of authenticity and proof, *ijmā'* is once again divided into two types: acquired *ijmā'* (*al-ijmā' al-muḥaṣṣal*) and transmitted *ijmā'* (*al-ijmā' al-manqūl*). The former is known to the *mujtahid* through direct participation and there remains no question about its proof. Transmitted *ijmā'* is, on the other hand, known through narration and reporting, which is either *mutawātir* or *āḥād*. According to the *jumhūr*, *tawātur* is not a prerequisite of all *ijmā'*. When *ijmā'* is received through *mutawātir* reports, it is definitive and binding, but *ijmā'* that is transmitted by way of solitary reports is also acceptable, albeit it only amounts to a probability; it is, in other words, a *ẓannī* *ijmā'* and compliance with it is not obligatory. Further details on this classification of *ijmā'* appear in our discussion of the transmission of *ijmā'* below.

The next topic that needs to be taken up in this context is the 'Medinan consensus' or *ijmā' ahl al-Madīnah*. According to the Mālikī 'ulamā', since Medina was the centre of Islamic teaching, the 'abode of *hijrah*' (*dār al-hijrah*) and the place where most of the Companions resided, the consensus of its people is bound to command high authority. Although the majority of 'ulamā' have held that the Medinan *ijmā'* is not a proof on its own, Imam Mālik held that it is. There is some disagreement among the disciples of Mālik as to the interpretation of the views of their Imam. Some of these disciples have observed that Imam Mālik had only meant that the *ijmā'* of the people of Medina is a proof 'from the viewpoint of narration and factual reporting' (*min jihah al-naql wa'l-rīwāyah*) as they were closest to the sources of the *Sharī'ah*. Other Mālikī jurists have held that Mālik only meant the Medinan *ijmā'* to be preferable but not exclusive. There are still others who say that Mālik had in mind the *ijmā'* of the Companions alone.

The Medinan practice may consist of their consensus on the

narration of the rules of *Sharī'ah* from the Prophet that are based on his sayings, acts, and tacit approvals. The sayings of the Prophet are the *ḥadīth* which might have also been verified by Medinan practice. As for the acts of the Prophet, the Medinan consensus has it, for example, that the Prophet used to perform *ṣalāt al-ʿid* in congregation; that he gave sermons from the pulpit facing the people with his back toward the *qiblah*. The Prophet's acts might at times have consisted of abandonment of something such as the Medinan consensus about the fact that there was no *adhān* and no *iqāmah* for the 'id prayer; that unlike the *adhān*, the *iqāmah* did not involve duplication (*tathniyah*); and that the martyrs of Uhud were not given a ceremonial bathing, nor did the Prophet perform any funeral prayers over them; and the fact also that the Prophet did not impose *zakāh* on vegetables.⁷⁰

The proponents of the Medinan *ijmā'* have sought to substantiate their views with *ḥadīth* which include the following: 'Medina is sacred, and throws out its dross as fire casts out the dross of metal',

المدينة طيبة ينفي خبثها كما ينفي الكبر خبث الحديد.

and 'Islam will cling to Medina as a serpent clings to its hole.'

إن الإسلام ليازر إلى المدينة كما تآزر الحية إلى جحرها.

The majority of jurists, however, maintain that these *ḥadīth* merely speak of the dignity of Medina and its people. Even if the *ḥadīth* are taken to rule out the presence of impurity in Medina, they do not mean that the rest of the *ummah* is impure, and even less that the Medinan *ijmā'* alone is authoritative. Had the sacred character of a place been a valid criterion, then one might say that the consensus of the people of Mecca would command even greater authority, as Mecca is the most virtuous of cities (*afḍal al-bilād*) according to the *naṣṣ* of the Qur'ān. Furthermore, knowledge and competence in *ijtihād* are not confined to any particular place. This is the purport of the *ḥadīth* in which the Prophet said: 'My Companions are like stars. Whomsoever of them that you follow will guide you to the right path.'

أصحابي كالنجوم بأيهم اقتديتم اهتديتم.

This *ḥadīth* pays no attention whatsoever to the place where a Companion might have resided.⁷¹ To this analysis, Ibn Ḥazm adds

the point that there were, as we learn from the Qur'an, profligates and transgressors (*fussāq wa'l-munāfiqūn*) in Medina just like other cities. The Companions were knowledgeable in the teachings of the Prophet wherever they were, within or outside Medina, and staying in Medina by itself did not necessarily enhance their standing in respect of knowledge, or the ability to carry out *ijtihād*.⁷²

VI. The Basis (*Sanad*) of *Ijmā'*

The *sanad* of *ijmā'* is defined as the *shar'ī* evidence on which the *mujtahidūn* have relied as basis of their consensual ruling. *Ijmā'* needs to have a *sanad*, for without a *sanad*, it is likely to indulge in *ra'y* without a grounding in the *nuṣūṣ*. According to the majority of 'ulamā', *ijmā'* must be founded in a textual authority or in *ijtihād*. Al-Āmidī points out that it is unlikely that the *ummah* might reach unanimity on something that has no foundation in the sources.⁷³ The 'ulamā' are in agreement that *ijmā'* may be based on the Qur'an or the *Sunnah*. An example of *ijmā'* based on the Qur'an is the *ijmā'* on the prohibition of marriage with one's grandmother, which is, in turn, based on the *āyah* 'forbidden to you are your mothers [*ummahātukum*]' (al-Nisā', 4:23).

حرمت عليكم أمهاتكم

An example of *ijmā'* based on *Sunnah* is the assignment of the share of one-sixth in inheritance for the grandmother, a ruling which is founded on an *āḥād ḥadīth* to the same effect. There is, however, disagreement as to whether *ijmā'* can be based on a ruling in the secondary proofs such as *qiyās* or *maṣlaḥah*.

There are three views on this point, the first of which is that *ijmā'* may not be founded on *qiyās*, for the simple reason that *qiyās* itself is subject to a variety of doubts. Since the authority of *qiyās* as a proof is not a subject on which the 'ulamā' are in agreement, how, then, could *ijmā'* be founded on it? It is further noted that the Companions did not reach a consensus on anything without the authority of the Qur'an or the *Sunnah*. In all cases in which the Companions are known to have reached a consensus, at the root of it there has been some authority in the primary sources.⁷⁴

The second view is that *qiyās* in all of its varieties may form the basis of consensus, for *qiyās* itself consists of an analogy to the *naṣṣ*. Relying on *qiyās* is therefore equivalent to relying on the *naṣṣ*, and

when *ijmā'* is based on a *qiyās*, it relies not on the personal views of the *mujtahidūn* but on the *naṣṣ* of the *Sharī'ah*.

The third view on this subject is that when the effective cause ('illah) of *qiyās* is clearly stated in the *naṣṣ*, or when the 'illah is indisputably obvious, then *qiyās* may validly form the basis of *ijmā'*. But when the 'illah of *qiyās* is hidden and no clear indication of it can be found in the *nuṣūṣ*, then it cannot form a sound foundation for *ijmā'*. Abū Zahrah considers this to be a sound opinion: when the 'illah of *qiyās* is indicated in the *nuṣūṣ*, reliance on *qiyās* is tantamount to relying on the *naṣṣ* itself.⁷⁵ Instances could be cited of *ijmā'* that is founded upon analogy. To give an example, a father is entitled to guardianship over the person and property of his minor child. By *ijmā'* this right is also established for the grandfather regarding his minor grandchild. This ruling of *ijmā'* is founded upon an analogy between the father and grandfather. A similar example is given regarding the assignment of punishment for wine-drinking (*shurb*). This penalty is fixed at eighty lashes, and an *ijmā'* has been claimed in its support. When the Companions were deliberating the issue, 'Alī ibn Abī Tālib drew an analogy between *shurb* and slanderous accusation (*qadhif*). Since *shurb* can lead to *qadhif*, the prescribed penalty for the latter was, by analogy, assigned to the former. The alleged *ijmā'* on this point has, however, been disputed in view of the fact that 'Umar ibn al-Khaṭṭāb determined the *ḥadd* of *shurb* at forty lashes, a position which has been adopted by Aḥmad ibn Ḥanbal. To claim an *ijmā'* on this point is therefore unwarranted.⁷⁶

Ijmā' may also be founded on *maṣlaḥah* and many examples of this can be found in the precedent of the Companions. One of these was the collection of the Qur'an in a single volume, which 'Umar ibn al-Khaṭṭāb is said to have recommended to Abū Bakr on the basis specifically of public good and *maṣlaḥah*. Another example was the decision not to distribute the land of Iraq among the conquerors. 'Abd al-Raḥmān ibn 'Awf and 'Ammār ibn Yāsir were for the distribution, but 'Umar, 'Uthmān, 'Alī and Mu'ādh were against it. The latter view prevailed and became *ijmā'*. And then we note that the second call (*adhān*) for the Friday prayers was introduced on grounds of *maṣlaḥah*. There used to be only one *adhān* for Friday prayers during the period of Abū Bakr and 'Umar, but later, when Medina expanded, a second *adhān* was introduced in order to publicise the occasion. Furthermore, Imam Mālik and Imam Abū Ḥanīfah gave *fatāwā* on the permissibility of giving *zakāh* to the descendants of Banū Hashim from the clan of the Prophet after the change in the

position of the Bayt al-Māl. We also note the *fatwā* by all the leading imams that the testimony of close relatives for one another, which was valid during the time of the Companions, was no longer to be admissible on the grounds of *maṣlahah*.⁷⁷

It is generally assumed that *ijmā'* cannot materialise on a ruling without there being some evidence on which it might be founded, even if the evidence in question is not cited in support. When the subsequent generations of 'ulamā' refer to a ruling of *ijmā'*, they discuss and ascertain its existence and authenticity, but not its underlying evidence, for if we were to refer to the basic evidence of *ijmā'*, we would give credit to that evidence, not to *ijmā'* as a proof in its own right.⁷⁸

VII. The Transmission of Ijmā'

As already noted, from the viewpoint of the reliability of its transmission, *ijmā'* is divided into two types: 'acquired' (*muḥaṣṣal*) and 'transmitted' (*manqūl*). The first is concluded with the direct participation of the *mujtahid* without the mediation of reporters or transmitters. The *mujtahid* thus gains direct knowledge of the opinions of other *mujtahidūn* when they all reach a consensus on a ruling. But transmitted *ijmā'* is established by means of reports which may either be solitary (*āḥād*) or conclusive (*mutawātir*). In the case of transmission by *tawātur* there is no problem of proof, but there is disagreement regarding *ijmā'* that is transmitted by way of solitary reports. We should note, however, that the *Sunnah* is supported by *isnād* and the kind of information that the 'ulamā' have compiled concerning the *Sunnah* has not been attempted with regard to *ijmā'*. It is therefore difficult to distinguish the definitive *ijmā'* from that which is based on probability alone.⁷⁹ Al-Ghazālī points out that a solitary report is not sufficient to prove *ijmā'*, although some *fuqahā'* have held otherwise. The reason is that *ijmā'* is a decisive proof whereas an *āḥād* report amounts to no more than speculative evidence; thus, it cannot establish *ijmā'*.⁸⁰

Al-Amīdī explains that a number of the 'ulamā' of the Shāfi'i, Hanafi and Hanbali schools validate the proof of *ijmā'* by means of solitary reports, whereas another group of Hanafi and Shāfi'i 'ulamā' do not. All have nevertheless agreed that anything that is proved by means of a solitary report is speculative of proof (*thubūt*) even if definitive in respect of content (*matn*).⁸¹

Proof by means of *tawātur* can only be claimed for the *ijmā'* of the

Companions; no other *ijmā'* is known to have been transmitted by *tawātur*. This is the main reason why the *fuqahā'* have differed in their views concerning any *ijmā'* other than that of the Companions. A large number of the 'ulamā' of *uṣūl* have maintained that transmission through solitary reports amounts to speculative evidence only. When *ijmā'* is based on such evidence, it loses its value and the *hukm* for which *ijmā'* is claimed must be referred back to the source from which it was derived in the first place.⁸²

VIII. Reform Proposals

The modern critics of *ijmā'* consider that *ijmā'* according to its classical definition fails to relate to the search for solutions to the problems of the community in modern times. *Ijmā'* is hence retrospective and too slow a process to accommodate the problems of social change. These and other considerations concerning the relevance of *ijmā'* to social realities have prompted a response from modern scholars. We have already discussed the view of 'Abd al-Wahhāb Khallāf in regard to the feasibility of *ijmā'*. Khallāf, however, was not the first to criticise *ijmā'*.

An early critique of *ijmā'* was advanced by Shāh Wali Allāh Dihlawī (d. 1176/1762), who tried to bring *ijmā'* closer to reality and came out in support of 'relativity' in the concept of *ijmā'*. Dihlawī overruled the notion of universal consensus in favour of relative *ijmā'*. Dihlawī is also critical of the interpretation that is given to the *ḥadīth* concerning *ijmā'*. He argues that the *ḥadīth*, 'My community shall never agree upon an error' did not envisage *ijmā'* at all. Hence the correct meaning of this *ḥadīth* should be determined in the light of another *ḥadīth* which states that: 'A section of my community will continue to remain on the right path'. *Ijmā'* in other words does not mean universal agreement but only the consensus of a limited number of *mujtahidūn*. With regard to the other *ḥadīth* that are quoted in support of *ijmā'*, Dihlawī maintains that the two principal aims of these *ḥadīth* are the political unity of the *ummah*, and the integrity of the *Sharī'ah*. The same author maintains that *ijmā'* can be justified on the basis of all such *ḥadīth* that protect the unity and integrity of the community. But he adds that *ijmā'* was never meant to consist of the universal agreement of every member of the community (or of every learned member of the community for that matter), as this is plainly impossible to achieve. It has neither happened in the past nor could it conceivably happen in the future. *Ijmā'*, according to Shāh Wali

Allāh, is the consensus of the '*ulamā*' and men of authority in different towns and localities. In this sense, *ijmā'* can be held anywhere at any time. The *ijmā'* of the Companions during the caliphate of 'Umar ibn al-Khaṭṭāb, and the *ijmā'* that was concluded in Mecca and Medina under the pious caliphs, are all examples of *ijmā'* in its relative sense.⁸³

Muhammad Iqbal is primarily concerned with the question of how to utilise the potential of *ijmā'* in the process of modern statutory legislation. He considers it an important doctrine, but one that has remained largely theoretical. 'It is strange,' Iqbal writes, that this important notion 'rarely assumed the form of a permanent institution'. He then suggests that 'the transfer of the power of *ijtihād* from individual representatives of schools to a Muslim legislative assembly... is the only possible form *ijmā'* can take in modern times'.⁸⁴ In such an assembly, the '*ulamā*' should play a vital part, but it must also include in its ranks laymen who happen to possess a keen insight into affairs. Furthermore Iqbal draws a distinction between the two functions of *ijmā'*, namely: discovering the law and implementing the law.

The former function is related to the question of facts and the latter relates to the question of law. In the former case, as for instance when the question arose whether the two small sūras known as 'Mu'awwazatāin' formed part of the Qur'ān or not – and the Companions unanimously decided that they did – we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and I venture to think, on the authority of Karkhī, that later generations are not bound by the decision of the Companions.⁸⁵

It is thus clear that Iqbal retains the binding character of *ijmā'* only insofar as it relates to points of fact, but not with regard to *ijmā'* that is based on juridical *ijtihād*. This distinction between the factual and juridical *ijmā'* will presumably not apply to the *ijmā'* that Iqbal has proposed: the collective decisions of the legislative assembly will naturally be binding on points of law.

Iqbal's proposed reform has been widely supported by other scholars. It is basically a sound proposal. But to relate this to the idea of a distinction between the factual and *ijtihādī* *ijmā'* seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical *ijmā'*, one can expect but little support for the view that the *ijmā'* of the Companions on *ijtihādī* matters is not binding.

Iqbal's views have, however, been criticised on other grounds. S.

M. Yusuf has observed that Iqbal was mistaken in trying to convert *ijmā'* into a modern legislative institution. Yusuf argues that *ijtihād* and *ijmā'* have never been the prerogatives of a political organisation, and any attempt to institutionalise *ijmā'* is bound to alter the nature of *ijmā'* and defeat its basic purpose, for *ijtihād* is a non-transferable right of every competent scholar, and a *mujtahid* accepted by the community by virtue of his recognised qualities, not through election campaigns or the award of official certificates. The process of arriving at *ijmā'* is entirely different from that of legislation in a modern state assembly. *Ijmā'* passes through a natural process which resembles that of the 'survival of the fittest'. No attempt is made in this process to silence the opposition or to defeat minority opinion. Opposition is tolerated until the truth emerges and prevails. *Ijmā'* is a manifestation of the conscience of the community, and it is due mainly to the natural strength of *ijmā'* and the absence of rigid organisation 'that no one is able to lay his hands on Islam; when anyone tries to hammer Islam, he ultimately finds to his chagrin that he has only been beating in the air'.⁸⁶

Ahmad Hasan finds some weaknesses in Yusuf's criticism of Iqbal, and observes that 'Dr Yusuf has probably not understood Iqbal's view correctly.' Hasan finds Iqbal's view that *ijtihād* should be exercised collectively instead of being a preserve of the individual *mujtahidūn*, to be basically sound. '*Ijihād* today cannot be exercised in isolation. Modern conditions demand that it should be exercised collectively. A *mujtahid* may be an expert in Islamic learning, but he cannot claim to be perfectly acquainted with the social conditions of a country and the diverse nature of its problems.'⁸⁷ Ahmad Hasan goes on to point out that the legislative assembly is 'the right place' for the purpose of collective *ijtihād*, which would in turn provide an effective method of finding solutions to urgent problems.⁸⁸

Al-Sanhuri highlighted the potential benefits of *ijmā'* and its contribution to the development of a representative government when he rather tersely posed the question: 'What is more democratic than to affirm that the will of the nation is the expression of the will of God Himself?'⁸⁹ Ḥassan Turābī also accentuated the role *ijmā'* can play in the democratisation of the political system in Muslim societies, and called for a re-interpretation of *ijmā'*. The original consensus, according to Turābī, 'was not the consensus of the learned élite but the more popular consensus of the Muslim community enlightened by its more learned members'.⁹⁰

The late Shaykh of al-Azhar, Maḥmūd Shaltūt, observes that the

conditions of a conclusive *ijmā'*, especially that which requires the agreement of all the *mujtahidūn* of the *ummah*, is no more than a theoretical proposition that is never expressed in reality. *Ijmā'*, in reality, has often meant either the absence of disagreement ('*adam al-'ilm bi'l-mukhālif*'), or the agreement of the majority only (*ittiṣāq al-kathrah*). Both of these are acceptable propositions which may form the basis of general legislation. Shaltūt goes on to quote in support the Qur'ānic *āyah* in sūra al-Baqarah (2:286) that 'God does not assign to any soul that which falls beyond its capacity'.

لا يكلف الله نفسا إلا وسعها

Shaltūt is not opposed to the institutionalisation of *ijmā'* provided that it does not violate the freedom of opinion that must in all eventualities be granted to the constituents of *ijmā'*. Consensus must never be subjected to a condition that subjugates freedom of opinion to the arbitrary exercise of political power. Shaltūt further adds that since the realisation of *maṣlahah* through consensus is the objective of *ijmā'*, *maṣlahah* is bound to vary according to the circumstances of time and place. Thus the *mujtahidūn* who participate in *ijmā'*, and their successors, should all be able to take into consideration a change of circumstances and it should be possible for them to review a previous *ijmā'* if this is deemed to be the only way to realise the *maṣlahah*. Should they arrive at a second *ijmā'*, this will nullify and replace the first, and constitute a binding authority on all members of the community.⁹¹

Badrān proposes a form of *ijmā'* which he says can be practised any time: this is the consensus of the *ūlū al-amr* or of the *ummah* on a ruling that is not found in the textual sources, and may be founded on *ra'y*, in order to secure a benefit for the people, such as consensus on the leadership of a particular person, enacting a maximum limit on ownership of agricultural lands, and declaration of war. Since the *ūlū al-amr* (those who are in charge of community affairs) are empowered to conclude this kind of *ijmā'* as and when they see occasion for it, it can be concluded at any time, but must have a strong consultative input. Such an *ijmā'*, Badrān adds, need not depend on the unanimity of all the *ūlū al-amr*, and may be concluded even in the face of some opposition. In support of this, Badrān refers to the report of Ibn Jarīr al-Ṭabarī, Aḥmad ibn Ḥanbal and Abū Bakr al-Rāzī to the effect that Abū Bakr was elected by *ijmā'* despite the opposition of 'Alī, and that the Caliph 'Umar returned from his trip

to Syria when he heard of the spread of cholera there after consulting the leading Companions. Abū Bakr and 'Umar also carried out consultation in administrative and judicial affairs.⁹²

As we can see, the substance of Badrān's proposal is not very different from that of Iqbal, and even that of Shāh Wali Allāh. *Ijmā'* must accordingly be made feasible and rendered into a practical proposition that can be utilised as an instrument of decision-making and legislation.

Conclusion

Under their classical definitions, *ijmā'* and *ijtihād* were both subject to conditions that virtually consigned them to the realm of utopia. The unreality of these formulations is reflected in modern times in the experience of Muslim nations and their efforts to reform certain areas of the *Shari'ah* through the medium of statutory legislation. The juristic basis for some of the modern reforms introduced in the areas of marriage and divorce, for example, has been sought through novel interpretations of the relevant passages of the Qur'ān. Some of these reforms may rightly be regarded as instances of *ijtihād* in modern times, yet in none of these instances do the statutory texts or their explanatory memoranda make an open reference to *ijtihād* or *ijmā'*. The total absence of these terms in modern statutes is a sad reflection of the unreality that is encountered in the strict definitions of these concepts. The classical definitions of *ijtihād* and *ijmā'* might, at one time, have served the purpose of discouraging excessive diversity which was felt to threaten the very existence and integrity of the *Shari'ah*. But there is no compelling reason to justify the continued domination of a practice that was designed to bring *ijtihād* to a close. *Ijihād* and *ijmā'* were brought to a standstill, thanks to the extremely difficult conditions that were imposed on them, conditions which often ran counter to the enterprising and creative spirit that characterised the period of the pious caliphs and the early *Imams* of jurisprudence.

Dr Yusuf's criticism of Iqbal's proposed reform is based on the dubious assumption that an elected legislative assembly will not reflect the collective conscience of the community, and will unavoidably be used as an instrument of power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit of *maṣlahah* and of the theory of *ijmā'* which endows the community with the divine trust of having the capacity and competence to make the right decisions. If one is to observe the

basic message of the textual authority in support of the 'iṣmah of the community, then one must trust the community itself to elect only those who will honour their collective conscience and their *maṣlahah*. In addition, Dr Yusuf's critique of Iqbal merely suggests that nothing should be done to relate *ijmā'* to the realities of contemporary life. The critic is content with the idea of letting *ijmā'* and *ijtihād* remain beyond the reach of the individuals and societies of today. On the contrary, the argument for taking a positive approach to *ijmā'* is overwhelming. The gap between the theory and practice of *Sharī'ah* law has reached alarming proportions, and any attempt to prolong it further will have to be exceedingly persuasive. While the need to take every precaution to safeguard the authentic spirit and natural strength of *ijmā'* is fully justified, this should not necessarily mean total inertia. The main issue in institutionalising *ijmā'*, as Shaltūt has rightly assessed, is that freedom of opinion should be vouchsafed for the participants of *ijmā'*. This is the essence of the challenge that has to be met, not through a *laissez-faire* attitude toward *ijtihād* and *ijmā'*, but by nurturing judicious attitudes and by evolving correct methods and procedures to protect freedom of opinion. The consensus that is arrived at in this spirit will retain a great deal, if not all, of the most valuable features of *ijmā'*.

NOTES

1. In the Qur'ān the phrase '*fa'imā ū-amrakum*' which occurs in sūra Yūnus (10:71) means 'determine your plan'. Similarly, '*fa'imā ū-kaydakum*' in sūra Tāhā (20:64), where the Prophet Noah addresses his estranged followers, means 'determine your trick'. The *ḥadīth* '*lā ṣiyāma liman lam yujma' al-ṣiyāma min al-layl*' means that fasting is not valid unless it is determined (or intended) in advance, i.e. from the night before. For details see Āmidī, *Iḥkām*, I, 195; Shawkānī, *Iḥṣād*, p. 70.
2. Āmidī, *Iḥkām*, I, 196; Shawkānī, *Iḥṣād*, p. 71. Abū Zahrah and 'Abd al-Wahhāb Khallāf's definition of *ijmā'* differs with that of Āmidī and Shawkānī on one point, namely the subject-matter of *ijmā'* which is confined to *sharī'ah* matters only (see Abū Zahrah, *Uṣūl*, p. 156 and Khallāf, *Ilm*, p. 45).
3. Shawkānī, *Iḥṣād*, p. 71.
4. According to one view, attributed to the Qāḍī 'Abd al-Jabbār, matters pertaining to warfare, agriculture, commerce, politics and administration are described as worldly affairs, and *ijmā'* is no authority regarding them. One reason given in support of this view is that the Prophet himself precluded these matters from the scope of the *Sunnah* and the same rule is to be applied to *ijmā'*. Āmidī, however, confirms the majority view when he adds (in his *Iḥkām*, I, 284) that these restrictions do not apply to *ijmā'*.

5. Abū Zahrah, *Uṣūl*, p. 165.
6. Cf. Aghnides, *Muhammadian Theories*, pp. 37-8.
7. Cf. Ahmad Hasan, *Early Development*, pp. 160ff.
8. Goldziher, *Introduction*, p. 52.
9. Muslim, *Sahīh*, p. 212, *ḥadīth* no. 817; Ibn Mājah, *Sunan*, II, 910, *ḥadīth* no. 2724; Abū Zahrah, *Uṣūl*, pp. 159-161.
10. Shāh Wali Allāh, *Qumrah*, p. 40.
11. Āmidī, *Iḥkām*, I, 226. Bazdawī, however, distinguishes matters which do not require specialised knowledge from other matters, and suggests that no discrimination should be made between the layman and the jurists regarding the essentials of the faith. *Ijmā'* is thus confined to the *mujtahidūn* only in regard to matters which require expert knowledge. See for details, Bazdawī, *Uṣūl*, III, 239.
12. Āmidī, *Iḥkām*, I, 235.
13. Cf. Zuhaylī, *Uṣūl*, pp. 586-7.
14. Shawkānī, *Iḥṣād*, p. 71.
15. Abū Zahrah, *Uṣūl*, p. 162.
16. Āmidī, *Iḥkām*, I, 261; Abdur Rahim, *Jurisprudence*, p. 122.
17. Abū Zahrah, *Uṣūl*, p. 164.
18. Shawkānī, *Iḥṣād*, p. 71.
19. Āmidī, *Iḥkām*, I, 257; Ibn Hāzim, *Iḥkām*, IV, 154.
20. Ghazālī, *Mustaṣṣaf*, I, 121.
21. Khallāf, *Ilm*, pp. 46-47; Abū Zahrah, *Uṣūl*, p. 167.
22. Ghazālī, *Mustaṣṣaf*, I, 121; Āmidī, *Iḥkām*, I, 219.
23. The *āyah* (4:59) provides: 'O you who believe, obey God and obey the Messenger, and those charged with authority among you.'
24. Rāzī, *Tafīr*, III, 243.
25. Khallāf, *Ilm*, p. 47.
26. The *āyah* (4:83) provides: 'If they would only refer it to the Messenger and those among them who hold command, those of them who investigate matters would have known about it' (Irving's translation, p. 45.)
27. Āmidī, *Iḥkām*, I, 211.
28. Ibid., I, 217; Ghazālī, *Mustaṣṣaf*, I, 111.
29. Ghazālī, *Mustaṣṣaf*, I, 111.
30. Ibid.
31. Ibid.
32. Shawkānī, *Fatḥ al-Qadīr*, I, 515; Shawkānī, *Iḥṣād*, p. 75. For a good summary of Shawkānī's views on the subject see Sadr, *Ijmā'*, pp. 30-40.
33. Rashīd Ridā, *Tafīr al-Manār*, V, 201. For a similar view see Sadr, *Ijmā'*, p. 40.
34. Āmidī, *Iḥkām*, I, 205.
35. Ibid., I, 218.
36. Ibn Mājah, *Sunan*, II, 1303, *ḥadīth* no. 3950. This and a number of other *ahādīth* on *ijmā'* have been quoted by both Ghazālī and Āmidī as shown in footnote 41 below.
37. Cf. Ahmad Hasan, *Doctrine*, p. 60.
38. Ghazālī, *Mustaṣṣaf*, I, 111.
39. Āmidī considers this to be a *ḥadīth* whose chain of narration goes back to the Prophet (see his *Iḥkām*, I, 214). Ahmad Hasan points out that Muḥammad ibn Hasan

al-Shaybānī initially reported this as a *ḥadīth*, but that later it was attributed to Ibn Mas'ūd (see his Doctrine, p. 37).

40. Ghazālī, *Mustaṣfā*, I, 111; Āmidī, *Iḥkām*, I, 220–2210.
41. Ghazālī, *Mustaṣfā*, I, 112.
42. Ibid., I, 112; we find in the Qur'an, for example, in an address to the Prophet Muhammad: 'And He found you wondering [ḍāllan] and gave you guidance' (al-Duhā, 93:7). In another place the Qur'an relates of Moses the following words: 'He said: I did it then [i.e. slayed the Egyptian] when I was in error' (al-Shu'arā, 26:20). In both these instances *dalāl* does not imply disbelief. Similarly the Arabic expression *dalla fulān 'an al-ḥarīq* (so-and-so lost his way) confirms the same meaning of *dalāl*.
43. Ibid., I, 112.
44. Šadr, *Ijmā'*, p. 43; an example of the 'lā of prohibition' is the Qur'anic prohibition concerning adultery which reads 'lā taqrabū al-zinā' (do not approach zinā). With a lā of prohibition the *ḥadīth* would simply instruct the community not to agree upon an error.
45. Šadr, *Ijmā'*, p. 43.
46. Riḍā, *Tafīr al-Manāḥ*, V, 205.
47. Šadr, *Ijmā'*, pp. 44–5.
48. Cf. Hasan, *Doctrine*, p. 59.
49. Šāfi'i, *Riḍālah* (trans. Khadduri), p. 285.
50. Hasan, *Doctrine*, pp. 59–60.
51. Shawkānī, *Iḥkām*, p. 79; Khallāf, *Ilm*, p. 48.
52. Khallāf, *Ilm*, p. 49.
53. Šāfi'i, *Riḍālah*, p. 205; Abū Zahrah, *Uṣūl*, p. 158.
54. Āmidī, *Iḥkām*, I, 230. Muṭaharī, *Jurisprudence*, p. 20.
55. Āmidī, *Iḥkām*, I, 246ff.
56. Khallāf, *Ilm*, p. 49.
57. Ibid., p. 49; Shawkānī, *Iḥkām*, p. 79.
58. Āmidī, *Iḥkām*, I, 198; Shawkānī, *Iḥkām*, p. 73.
59. Abū Zahrah, *Uṣūl*, p. 159.
60. Ibid., p. 163.
61. Hasan, *Doctrine*, p. 164.
62. Khallāf, *Ilm*, pp. 49–50.
63. Ibid., p. 50.
64. Sha'ban, *Uṣūl*, pp. 89–90; al-Khūdārī, *Uṣūl*, p. 278.
65. Shawkānī, *Iḥkām*, p. 72; Zuhayrī, *Uṣūl*, p. 553.
66. Shawkānī, *Iḥkām*, p. 72; Abū Zahrah, *Uṣūl*, p. 163.
67. Ghazālī, *Mustaṣfā*, I, 111; Elz III, 1024.
68. Ismā'il, *Dirāḥat*, p. 85.
69. Khallāf, *Ilm*, p. 51.
70. Ismā'il, *Dirāḥat*, pp. 133ff.
71. Bukhārī, *Sahīḥ* (Istanbul edn), II, 221; Muslim, *Sahīḥ*, p. 17, *ḥadīth* no. 38; Āmidī, *Iḥkām*, I, 243. Ibn Ḥazm discusses *ijmā' ahl al-Madīnah* in some length, but cites none of the *ahādīth* that are quoted by Āmidī and others. He merely points out that 'some of the *ahādīth* which are quoted in support of the Mālikī doctrine are authentic [*ṣahīḥ*], while others are mere fabrications [*makdhūb maḥḥūḍ*] reported by one Muḥammad ibn Ḥasan ibn Zabālah' (*Iḥkām*, IV, 154–155).

72. Āmidī, *Iḥkām*, I, 243ff.
73. Ibn Ḥazm, *Iḥkām*, IV, 155.
74. Āmidī, *Iḥkām*, I, 261.
75. Abū Zahrah, *Uṣūl*, pp. 165–6.
76. Ibid.
77. Sha'ban, *Uṣūl*, pp. 94–96.
78. Cf. Zarqā, *Madhkal*, I, 65.
79. Zuhayrī, *Uṣūl*, III, 221.
80. Ghazālī, *Mustaṣfā*, I, 127; Šadr, *Ijmā'*, pp. 97–8.
81. Āmidī, *Iḥkām*, I, 281.
82. Abū Zahrah, *Uṣūl*, pp. 167–8.
83. Shāh Wali Allāh, *Izālah*, I, 26.
84. Iqbal, *Reconstruction*, pp. 173–4.
85. Ibid., p. 175. Iqbal goes on to quote the Ḥanafī jurist Abū'l-Ḥasan al-Karkhī as saying: 'The *Sunnah* of the Companions is binding in matters which cannot be cleared up by *qiyās*, but it is not so in matters which can be established by *qiyās*.' (No specific reference is given to al-Karkhī's work.)
86. Yusuf, *Studies*, pp. 212–8.
87. Hasan, *Doctrine*, p. 244.
88. Ibid.
89. See Enid Hill's article on Sanhuri in Azmeh (ed.), *Islamic Law*, p. 15.
90. Turābī, *Tajdīd*, p. 32.
91. Shalūt, *Islām*, pp. 558–9.
92. Badrān, *Uṣūl*, p. 224.

CHAPTER NINE

Qiyās (Analogical Reasoning)

Literally, *qiyās* means measuring or ascertaining the length, weight or quality of something, which is why scales are called *miqyās*. Thus the Arabic expression '*qāsat al-thawb bi'l-dhirā'*' means that 'the cloth was measured by the yardstick'.¹ *Qiyās* also means comparison, with a view to suggesting equality or similarity between two things. Thus the expression '*Zayd yuqās ilā Khālīd fi 'aqlihi wa nasabih*' means that 'Zayd compares with Khālīd in intelligence and descent'.² *Qiyās* thus suggests an equality or close similarity between two things, one of which is taken as the criterion for evaluating the other.

Technically, *qiyās* is the extension of *Sharī'ah* value from an original case, or *asl*, to a new case, because the latter has the same effective cause as the former. The original case is regulated by a given text, and *qiyās* seems to extend the same textual ruling to the new case.³ It is by virtue of the commonality of the effective cause, or '*illah*', between the original case and the new case that the application of *qiyās* is justified. A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'ān, the *Sunnah* or a definite *ijmā'*. For it would be futile to resort to *qiyās* if the new case could be resolved under a ruling of the existing law. It is only in matters that are not covered by the *nuṣūṣ* and *ijmā'* that the law may be deduced from any of these sources through the application of analogical reasoning.⁴

In the usage of the *fuqahā'*, the word '*qiyās*' is sometimes used to denote a general principle. Thus one often comes across statements that this or that ruling is contrary to an established analogy, or to a general principle of the law without any reference to analogy as such.

Analogical deduction is different from interpretation in that the former is primarily concerned with the extension of the rationale of a given text to cases which may not fall within the terms of its language. *Qiyās* is thus a step beyond the scope of interpretation. The emphasis in *qiyās* is clearly placed on the identification of a common cause between the two cases which is not indicated in the language of the text. Identifying the effective cause often involves intellectual exertion on the part of the jurist, who determines it by recourse not only to the semantics of a given text but also to his understanding of the general objectives of the law.

Since it is essentially an extension of the existing law, the jurists do not admit that extending the law by the process of analogy amounts to establishing a new law. *Qiyās* is a means of discovering, and perhaps of developing, existing law. Although *qiyās* offers considerable potential for creativity and enrichment, it is basically designed to endure conformity with the letter and the spirit of the Qur'ān and the *Sunnah*. In this sense, it is perhaps less than justified to call *qiyās* one of the sources (*maṣādir*) of the *Sharī'ah*; it is rather a proof (*hujjah*) or an evidence (*dalīl*) whose primary aim is to ensure consistency between revelation and reason in the development of the *Sharī'ah*. *Qiyās* is admittedly a rationalist doctrine, but it is one in which the use of personal opinion (*ra'y*) is subservient to the terms of divine revelation. The main sphere for the operation of human judgement in *qiyās* is the identification of a common '*illah*' between the original and the new case. Once the '*illah*' is identified, the rules of analogy then necessitate that the ruling of the given text be followed without any interference or change. *Qiyās* cannot be used, therefore, as means of altering the law of the text on grounds of either expediency or personal preference.

The jurist who resort to *qiyās* takes it for granted that the rules of *Sharī'ah* follow certain objectives (*maqāṣid*) that are in harmony with reason. A rational approach to the discovery and identification of the objectives and intentions of the Lawgiver necessitates recourse to human intellect and judgement in the evaluation of the *ahkām*. It is precisely on this ground, namely the propriety or otherwise of adopting an inquisitive approach to the injunctions of the Lawgiver, referred to as *ta'līl*, that *qiyās* has come under attack by the Mu'tazilah, the Zāhirī, the Shī'ī and some Hanbalī '*ulamā'*'. Since an enquiry into the causes and objectives of divine injunctions often involves a measure of juristic speculation, the opponents of *qiyās* have questioned its essential validity. Their argument is that the law must be based on

certainty, whereas *qiyās* is largely speculative and superfluous. If the two cases are identical and the law is clearly laid down in regard to one, there is no case for *qiyās*, as both will be covered by the same law. If they are different but bear a similarity to one another, then it is impossible to know whether the Lawgiver had intended the subsidiary case to be governed by the law of the original case. It is once again in recognition of this element of uncertainty in *qiyās* that the 'ulamā' of all the juristic schools have ranked *qiyās* as a 'speculative evidence'. With the exception, perhaps, of one variety of *qiyās*, namely where the 'illah of *qiyās* is clearly identified in the text, *qiyās* in general can never be as high as authority as the *naṣṣ* or a definite *ijma'*, for these are decisive evidences (*adillah qaf'iyyah*), whereas *qiyās* in most cases only amounts to a probability. It is, in other words, merely probable, but not certain, that the result of *qiyās* is in conformity with the intentions of the Lawgiver. The propriety of *qiyās* is thus always to be measured by the degree of its proximity and harmony with the *nuṣṣ*. In our discussion of the methodology of *qiyās* it will at once become obvious that the whole purpose of this methodology is to ensure that under no circumstances does analogical deduction operate independently of the *nuṣṣ*. It would be useful to start by giving a few examples.

(1) The Qur'ān (al-Jumu'ah, 62:9) forbids selling or buying goods after the last call for Friday prayer until the end of the prayer. By analogy this prohibition is extended to all kinds of transactions, since the effective cause, that is, diversion from prayer, is basically common to all.⁵

(2) The prophet is reported to have said, 'The killer shall not inherit [from his victim]'.

لا يرث القاتل.

By analogy this ruling is extended to bequests, which would mean that the killer cannot benefit from the will of his victim either.⁶

(3) According to a *hadith*, it is forbidden for a man to make an offer of betrothal to a woman who is already betrothed to another man unless the latter permits it or has totally abandoned his offer.

لا يخطب الرجل على خطبة أخيه حتى ينكح أو يترك.

The 'illah of this rule is to obviate conflict and hostility among people. By analogy the same rule is extended to all other transactions in which

the same 'illah is found to be operative.⁷ One can refer to numerous instances, in the area of *mu'āmalat*, where the rules of *fiqh* have been developed through analogy. Note, for example, the following.

(1) Many of the textual rulings of the *Shari'ah* concerning contract of sale have by analogy been extended to other contracts, such as those of lease and hire (*al-ijārah*) as the latter is in effect sale of the usufruct and has an aspect in common with the sale of objects.

(2) The *Sunnah* has validated the option of stipulation (*khiyār al-shart*) for the buyer for the purpose mainly of protecting him against fraud. By analogy, the jurists have granted the same facility to the seller, as he too may be in need of protection.

(3) The textual rulings of *Shari'ah* obligate the usurper to return the object to its owner, if the object is still in existence, but to compensate the owner if the object has been disposed of or consumed. This ruling has by analogy been extended to the case where the usurper has converted the object into something else, such as converting steel into a sword or wheat into bread, for the owner's right to the original property ceases when it is converted into something that is referred to by a different name, and he is therefore entitled to compensation.⁸

The majority of 'ulamā' have defined *qiyās* as the application to a new case (*far'*), on which the law is silent, of the ruling (*hukm*) of an original case (*asl*) because of the effective cause ('illah) which is in common to both.⁹ The Hanafi definition of *qiyās* is substantially the same, albeit with a minor addition designed to preclude certain varieties of *qiyās* (such as *qiyās al-awlaw* and *qiyās al-musāwif*) from the scope of *qiyās*. The Hanafi jurist, Saḍr al-Shari'ah, in his *Tawḍīh*, as translated by Aghnides, defined *qiyās* as 'extending the [*Shari'ah*] value from the original case over to the subsidiary [*far'*] by reason of an effective cause which is common to both cases and cannot be understood from the expression [concerning the original case] alone.'¹⁰ The essential requirements of *qiyās* that are indicated in these definitions are as follows.

(1) The original case, or *asl*, on which a ruling is given in the text and which analogy seeks to extend to a new case. (2) The new case (*far'*) on which a ruling is needed. (3) The effective cause ('illah) which is an attribute (*waṣf*) of the *asl* and is found to be common to the original and the new case. (4) The rule (*hukm*) governing the original case which is to be extended to the new case.¹¹ To illustrate these, we might adduce the example of the Qur'ān (al-Mā'idah, 5:90) which explicitly forbids wine-drinking. If this prohibition is to be extended by analogy to narcotic drugs, the four pillar of analogy in this example would be:

<i>aṣl</i>	<i>far'</i>	' <i>illah</i>	<i>ḥukm</i>
wine-drinking	taking drugs	intoxicating effect	prohibition

Each of the four essentials (*arkān*) of analogy must, in turn, qualify of other conditions that are all designed to ensure propriety and accuracy in the application of *qiyās*. It is to these which we now turn.

I. Conditions Pertaining to the Original Case (*Aṣl*)

Aṣl has two meanings. Firstly, it refers to the source, such as the Qur'ān or the *Sunnah*, that reveals a particular ruling. The second meaning of *aṣl* is the subject matter of that ruling. In the foregoing example of the prohibition of wine in the Qur'ān, the *aṣl* is both the Qur'ān, which is the source, and wine, which is the original case or the subject-matter of the prohibition. However, to all intents and purposes, the two meanings of *aṣl* are convergent. We tend to use *aṣl* as to imply the source as well as the original case, for the latter constitutes the subject-matter of the former, and the one cannot be separated from the other.¹²

The '*ulamā'* are in unanimous agreement that the Qur'ān and the *Sunnah* constitute the sources, or the *aṣl*, of *qiyās*. According to the majority of jurists, *qiyās* may also be founded on a rule that is established by *ijmā'*. For example, *ijmā'* validates guardianship over the property of minors, a rule that has been extended by analogy to authorise the compulsory guardianship (*waliyah al-ijbār*) of minors in marriage.¹³

There is, however, some disagreement as to whether *ijmā'* constitutes a valid *aṣl* for *qiyās*. Those who dispute the validity of *ijmā'* as a basis of analogical deduction argue that the rule of consensus do not require that there should be a basis (*sanad*) for *ijmā'*. In other words, *ijmā'* does not always explain its own justification or rationale. In the absence of such information, it is difficult to construct an analogy. In particular, it would be difficult to identify the '*illah*, and *qiyās* cannot be constructed without the '*illah*.¹⁴ But this view is based on the assumption that the '*illah* of *qiyās* is always identified in the sources, which is not the case.

The '*illah* may at times be specified in the sources, but when this is not so, it is for the *mujtahid* to identify it in the light of the objectives (*maqāṣid*) of the Lawgiver. The *mujtahid*, in other words, is faced with the same task whether he derives the '*illah* from *ijmā'* or from the *nuṣūṣ*. Furthermore, the majority view that validates the found-

ing of analogy on *ijmā'* maintains that consensus itself is a basis (*sanad*), and that the effective cause of a ruling that is based on consensus can be identified through *ijtihād*.¹⁵

According to the majority of '*ulamā'*, one *qiyās* may not constitute the *aṣl* of another *qiyās*. This is explained in reference to the effective cause on which the second analogy is founded. If this is identical with the original '*illah*, then the whole exercise will be superfluous. For instance, if it is admitted that the quality of edibility is the effective cause that would bring an article within the scope of usury (*ribā*) then this would justify an analogy to be drawn between wheat and rice. But an attempt to draw a second analogy between rice and edible oil for the purpose of extending the rules of *ribā* to the latter would be unnecessary, for it would be preferable to draw a direct analogy between wheat and edible oil, which would eliminate the intermediate analogy with rice altogether.¹⁶

However, according to the prominent Mālikī jurist, Ibn Rushd (whose views are here representative of the Mālikī school) and some Ḥanbalī '*ulamā'*, one *qiyās* may constitute the *aṣl* of another: when one *qiyās* is founded on another *qiyās*, the *far'* of the second becomes an independent *aṣl* from which a different '*illah* may be deduced. This process may continue ad infinitum with the only proviso being that in cases where analogy can be founded in the Qur'ān, recourse may not be had to another *qiyās*.¹⁷ But al-Ghazālī rejects the proposition of one *qiyās* forming the *aṣl* of another altogether. He compares this to the work of a person who tries to find pebbles on the beach that look alike. Finding one that resembles the original, he then throws away the original and tries to find one similar to the second, and so on. By the time he finds the tenth, it will not be surprising if it turns out to be totally different from the first in the series. Thus, for al-Ghazālī, *qiyās* founded on another *qiyās* is like speculation built upon speculation, and the further it continues along the line, the more real becomes the possibility of error.¹⁸

Having discussed Ibn Rushd's view at some length, however, Abū Zahrah observes that from a juristic viewpoint, one has little choice but to agree with it. This is reflected, for example, in modern judicial practice where court decisions are often based on the analogical extension of the effective cause (i.e. *ratio decidendi*) of an existing decision to a new case. The new decision may be based on the rationale of a previous case but may differ with it in some respect. In this event, it is likely to constitute an authority in its own right. When, for example, the Cassation Court (*maḥkamah al-naqd*) in Egypt approves a judicial

ruling, it becomes a point of reference in itself, and an analogy upon it is made whenever appropriate without further inquiry into its origin. What Abū Zahrah is saying is that the doctrine of *stare decisis*, which is partially adopted in some Islamic jurisdictions, take for granted the validity of the idea that one *qiyās* may become the *aṣl* of another *qiyās*.¹⁹

According to the Syrian jurist Muṣṭafā al-Zarqā, the formula that one *qiyās* may be founded on another *qiyās* has in it the seeds of enrichment and resourcefulness. No unnecessary restrictions should therefore be imposed on *qiyās* and on its potential contribution to the *Sharī'ah*.²⁰

II. Conditions Pertaining to the *Hukm*

A *hukm* is a ruling, such as a command or a prohibition, dispensed by the Qur'ān, the *Sunnah* or *ijmā'*, and analogy seeks its extension to a new case. In order to constitute the valid basis of an analogy, the *hukm* must fulfil the following conditions.

(1) It must be a practical *sharī'ah* ruling, for *qiyās* is only operative in regard to practical matters inasmuch as this is the case with *fiqh* as a whole. *Qiyās* can only be attempted when there is a *hukm* available in the sources. In the event where no *hukm* can be found in any of the three sources regarding a case, and its legality is determined with reference to a general maxim such as original freedom from liability (*al-barā'ah al-aṣliyyah*), no *hukm* can be said to exist. Original freedom from liability is not regarded as a *hukm sharī'ah* and may not therefore form the basis of *qiyās*.²¹

(2) The *hukm* must be operative, which means that it has not been abrogated. Similarly, the validity of the *hukm* that is sought to be extended by analogy must not be the subject of disagreement and controversy.²²

(3) The *hukm* must be rational in the sense that the human intellect is capable of understanding the reason or the cause of its enactment, or that the *'illah* is clearly given in the text itself. For example, the effective cause of prohibitions such as those issued against gambling and misappropriating the property of another is easily discernible. But when a *hukm* cannot be so understood, as in the case of the number of prostrations in *ṣalāh*, or the quantity of *zakāh*, it may not form the basis of analogical deduction. Ritual performances, or *'ibādāt*, on the whole, are not the proper subject of *qiyās* simply because their effective causes cannot be ascertained by the human intellect. Although the general purpose of *'ibādāt* is often understandable, this is not

sufficient for the purpose of analogy. Since the specific causes (*al-'ilal al-juz'iyah*) of *'ibādāt* are only known to Almighty God, no analogy can be based upon them.

All the rational *ahkām* (*al-ahkām al-ma'qūlah*), that is laws whose causes are perceivable by human intellect, constitute the proper basis of *qiyās*. According to Imām Abū Hanīfah, who represents the majority opinion, all the *nuṣūṣ* of *Sharī'ah* are rational and their causes can be ascertained except where it is indicated that they fall under the rubric *'ibādāt*. The Zāhirīs and 'Uthmān al-Bāttī, a contemporary of Abū Hanīfah, have, on the other hand, held that the effective causes of the *nuṣūṣ* cannot be ascertained without an indication in the *nuṣūṣ* themselves. This view clearly discourages enquiry into the causes of the rules of *Sharī'ah* and advises total conformity to them without any search for justification or rationale.²³ 'We do not deny', writes Ibn Hazm, 'that God has assigned certain causes to some of His laws, but we say this only when there is a *naṣṣ* to confirm it.' He then goes on to quote a *ḥadīth* of the Prophet to the effect that 'the greatest wrongdoer in Islam is one who asks about something which is not forbidden, and it is then forbidden because of his questioning.'

إن أعظم للمسلمين في المسلمين جرماً من سأل عن شيء
لم يُحرّم على المسلمين فحرّم عليهم من أجل مسأله.

Ibn Hazm continues: 'We firmly deny that all the *ahkām* of *Sharī'ah* can be explained and rationalised in terms of causes. Almighty God enacts a law as He wills.' The question of 'how and why' does not and must not be applied to His will. Hence it is improper for anyone to enquire, in the absence of a clear text, into the causes of divine laws. Anyone who poses questions and searches for the causes of God's injunctions 'defies Almighty God and commits a transgression',²⁴ for he will be acting contrary to the purport of the Qur'ān where God describes Himself saying, 'He cannot be questioned for His acts, but they will be questioned for theirs' (*al-Anbiyā'*, 21:23).'

لا يسأل عما يفعل وهم يسألون

It is thus known, Ibn Hazm concludes, that causes of any kind do not apply to the acts and words of God, for justification and *ta'līl* is the work of one who is weak and compelled (*muḥṭar*), and God is above all this.²⁵

The issue of causation acquires a special significance in the context of divinely-ordained laws, simply because revelation was discontinued with the demise of the Prophet, who is no longer present to explain and identify the causes of the revealed laws. The Muslim jurists, like other believing Muslims, have shown a natural reluctance to be too presumptuous in their efforts to identify the causes of divine laws. But the issue does not pose itself in the same way regarding secular or man-made law. The norm in regard to modern laws is that they all have identifiable causes that can be ascertained with reasonable certainty. As such, analogical deduction in the context of modern law is a relatively easier proposition. But there are certain restrictions which discourage a liberal recourse to analogy even in modern law. For one thing, the operation of analogy in modern law is confined to civil law. In the area of crimes, the constitutional principle of legality discourages the analogical extension of the text. It should be further noted that owing to extensive reliance on statutory legislation, there is no crime and no punishment in the absence of a statutory text that clearly defines the offence or the penalty in question. Crimes and penalties are thus to be governed by the text of the law and not by the analogical extension of the text. It will thus be noted that owing to the prevalence of statutory legislation in modern legal systems, the need for recourse to analogy has been proportionately diminished. This in turn explains why *qiyās* tends to play a more prominent role in the *Shari'ah* than in modern law.

But in *Shari'ah* law too, as we shall later elaborate, there are restrictions on the operation of *qiyās* in regard to crime and penalties. The *qāḍī*, as a result, may not draw analogies between, for example, wine-drinking and hashish owing to the similar effects that the might have on the human intellect. Nor may the crime of *zinā* be made the basis of analogy so as to apply its penalty to similar cases.²⁶

(4) The fourth requirement concerning the *hukm* is that it must not be confined to an exceptional situation or to a particular state of affairs. *Qiyās* is essentially designed to extend the normal, not the exceptional, rules of the law. Thus when the Prophet admitted the testimony of Khuzaymah alone to be equivalent to that of two witnesses, he did so by way of an exception. The precedent in this case is therefore not extendable by analogy.²⁷ Some of the rulings of the Qur'an which relate exclusively to the Prophet, such as polygamy beyond the maximum of four, or the prohibition in regard to marriage for the widows of the Prophet (al-Aḥzāb, 33:53), are similarly not extendable by analogy. The legal norms on these matters have been

laid down in the Qur'an, which enacts the minimum number of witness at two, the maximum for polygamy at four, and allows a widow to remarry after the expiry of the waiting period of *'iddah*.

(5) And lastly, the law of the text must not represent a departure from the general rules of *qiyās* in the first place. For example, travelling during Ramaḍān is the cause of a concession that exonerates the traveller from the duty of fasting. The concession is an exception to the general rule that requires everyone to observe the fast. It may therefore not form the basis of an analogy in regard to other types of hardship. Similarly, the concession granted in *wuḍū'* (ablution) in regarding to wiping over boots represents a departure from the general rule which requires washing the feet. The exception in this case is not extendable by way of analogy to similar cases such as socks.

But according to the Shafi'is, when the *'illah* of a ruling can be clearly identified, analogy may be based on it even if the ruling was exceptional in the first place. For example, the transaction of *'arāyā*, or the sale of fresh dates on the tree in exchange for dry dates, is exceptionally permitted by *ḥadīth*, notwithstanding the somewhat usurious nature of this transaction: the rules of *ribā'* forbid the exchange of identical commodities of unequal quantity. The *'illah* of this permissibility is to fulfil the need of the owner of unripe dates for the dried variety. By way of analogy, the Shafi'is have validated the exchange of grapes for raisins on the basis of a similar need. The Ḥanafis have however disagreed, as the ruling of *'arāyā* is exceptional in the first place.²⁸

III. The New Case (*Far'*)

The *far'* is an incident or a case whose ruling is sought by recourse to analogy. The *far'* must fulfil the following three conditions.

(1) The new case must not be covered by the text or *ijmā'*, for in the presence of a ruling in these sources, there will be no need for recourse to *qiyās*. However, some Ḥanafī and Mālikī jurists have at times resorted to *qiyās* even in cases where a ruling could be found in the sources. But they have done so only where the ruling in question was of a speculative type, such as a solitary *ḥadīth*. We shall have occasion to elaborate on this point later.

(2) The effective cause of analogy must be applicable to the new case in the same way as to the original case. Should there be no uniformity, or substantial equality between them, the analogy is technically called *qiyās ma'al fā'iḳ*, or '*qiyās* with a discrepancy', which is

invalid. If, for example, the 'illah of the prohibition of wine is intoxication, then a beverage that only causes a lapse of memory would differ from wine in respect of the application of the 'illah, and this would render the analogy invalid.²⁹

To give another example, according to the Hanafis, a sane and adult woman is competent to conclude a contract of marriage on her own behalf. They have inferred this by analogy to the Qur'anic ruling (al-Nisā', 4:6) which entitles her to enter business transaction of her own free will. The majority of jurists, however, disagree, as they consider the analogy in question to be *qiyās* with a discrepancy. Marriage differs from other transactions; business transactions are personal matters, but marriage concerns the family and the social status of the parents and guardians. Hence an analogy between marriage and other transactions is unjustified.³⁰

(3) The application of *qiyās* to a new case must not result in altering the law of the text, as this would mean overruling the text by means of *qiyās* which is *ultra vires*. An example of this is the case of false accusation (*qadhif*) which by an express *naṣṣ* (sūra al-Nūr, 24:4) constitutes a permanent bar to the acceptance of one's testimony. Al-Shafi'i has, however, drawn an analogy between false accusation and other grave sins (*kabā'ir*): a person who is punished for a grave sin may be heard as a witness after repentance. In the case of false accusation, too, repentance should remove the bar to the admission of testimony. To this the Hanafis have replied that an analogy of this kind would overrule the law of the text which forever proscribes the testimony of a false accuser.³¹

On a similar note, the validity of the contract of *salam* has been established in a *ḥadīth* which defines it as the advance sale of an article to be delivered at a fixed rate. But when the Shafi'is hold that such a contract is lawful even if no date is fixed for delivery, they are charged with introducing a change in the law of the text.³²

IV. The Effective Cause ('Illah)

This is perhaps the most important of all the requirements of *qiyās*. The 'illah has been variously defined by the 'ulamā' of *uṣūl*. According to the majority, it is an attribute of the *aṣl* which is constant and evident and bears a proper (*munāsib*) relationship to the law of the text (*ḥukm*). It may be a fact, a circumstance, or a consideration which the Lawgiver has contemplated in issuing a *ḥukm*. In the words of *uṣūl*, the 'illah is alternatively referred to as *manāt al-ḥukm* (i.e. the

cause of *ḥukm*), the sign of the *ḥukm* (*amārah al-ḥukm*) and *sabah*.³³ Some 'ulamā' have attached numerous conditions to the 'illah, but most of these are controversial and may be summarised in the following five.³⁴

(1) According to the majority of 'ulamā', the 'illah must be a constant attribute (*mundabbiḥ*) which is applicable to all cases without being affected by differences of persons, time, place and circumstances. The Mālikis and the Hanbalis, however, do not agree with this requirement as they maintain that the 'illah need not be constant, and that it is sufficient if the 'illah bears a proper or reasonable relationship to the *ḥukm*. The difference between the two views is that the majority distinguish the effective cause from the objective (*ḥikmah*) of the law and preclude the latter from the scope of the 'illah.³⁵

The 'illah is constant if it applies to all cases regardless of circumstantial changes. To give an example, according to the rules of pre-emption (*shuf'*), the joint, or neighbouring, owner of a real property has priority in buying the property whenever his partner or his neighbour wishes to sell it. The 'illah in pre-emption is joint ownership itself, whereas the *ḥikmah* of this rule is to protect the partner/neighbour against possible harm that may arise from sale to a third party. Now the harm that the Lawgiver intends to prevent may materialise or it may not. As such, the *ḥikmah* is not constant and may therefore not constitute the 'illah of pre-emption. Hence the 'illah in pre-emption is joint ownership itself, which unlike the *ḥikmah* is permanent and unchangeable, as it does not fluctuate with such changes in circumstances.

The majority view maintains that the rules of *Sharī'ah* are founded on their causes ('ilah), not in their objectives (*ḥikmah*). From this, it would follow that a *ḥukm shar'i* is present whenever its 'illah is present even if its 'illah is not, and a *ḥukm shar'i* is absent in the absence of its 'illah even if its *ḥikmah* is present. The jurist and the judge must therefore enforce the law whenever its 'illah is known to exist regardless of its *ḥikmah*. Hence it will be a mistake for a judge to entitle to the right of pre-emption a person who is neither a partner nor a neighbouring owner on the mere assumption that he may be harmed by the sale of the property to a certain purchaser.³⁶

The Mālikis and the Hanbalis, on the other hand, do not draw any distinction between the 'illah and the *ḥikmah*. In their view, the *ḥikmah* aims to attract an evident benefit or preventing an evident harm, and this is the ultimate objective of the law. When, for example, the law allows the sick not to observe the fast, the *ḥikmah* is the prevention of hardship to them. Likewise the *ḥikmah* of retaliation

(*qiyās*) in deliberate homicide, or of the *ḥadd* penalty in theft, is to protect the lives and properties of the people. Since the realisation of benefit (*maṣlaḥah*) and prevention of harm (*maṣḍaḥ*) is the basic purpose of all the rules of *Shari'ah*, it would be proper to base an analogy on the *hikmah*.³⁷

Qiyās that is founded on *maṣlaḥah*, or *qiyās al-maṣlaḥī*, according to Ibn Rushd, is a more versatile *qiyās*, which is why it is also known as *qiyās al-mursāl*, in that it follows the dictates of *maṣlaḥah* as a general objective of the *Shari'ah*, even at the expenses of some vagueness in the specifics of the '*illah*' and *asl*. Among modern writers, Ḥasan Turābī considers this to be a preferable *qiyās*, as it is not burdened by the technicalities of '*illah*'; and he refers to it interchangeably as *qiyās al-ijmālī*, that is, open or versatile analogy.³⁸

The Ḥanafīs and the Shafi'īs, however, maintain that '*illah*' must be both evident and constant. In their view the '*illah*' secures the *hikmah* most of the time but not always. Their objection to the *hikmah* being the basis of analogy is that the *hikmah* of the law is often a hidden quality that cannot be detected by the senses, and this would in turn render the construction of analogy upon it unfeasible. The *hikmah* is also variable according to circumstances, and this adds further to the difficulty of basing analogy on it. The *hikmah*, in other words, is neither constant nor well-defined, and may not be relied upon as a basis of analogy.

To give an example, the permission granted to travellers to break the fast while travelling is to relieve them from hardship. This is the *hikmah* of this ruling. But since hardship is a hidden phenomenon and often varies according to persons and circumstances, it may not constitute the effective cause of an analogy. The concession is therefore attached to travelling itself which is the '*illah*' regardless of the degree of hardship that it may cause to individual travellers.³⁹

To give another example, the '*illah*' in the prohibition of passing a red traffic light is the appearance of the red light itself. The *hikmah* is to prevent irregularities and accidents. Anyone who passes a red light is committing an offence even if no accident is caused as a result. The '*illah*' and *hikmah* can as such exist independently of one another, the latter being less easily ascertainable than the former. On a similar note, the '*illah*' in awarding a law degree is passing one's final examinations and obtaining the necessary marks therein. The *hikmah* may be the acquisition of a certain standard of knowledge in the disciplines concerned. Now it is necessary that university degrees are awarded on a constant and reliable basis, which is passing the exams. The

acquisition of legal knowledge often, but not always, goes hand in hand with the ability to pass exams, but this by itself is not as readily ascertainable as the exam results are.

(2) As already stated, the effective cause on which an analogy is based must also be evident (*ẓāhir*). Hidden phenomena such as intention, goodwill, consent, etc., which are not clearly ascertainable may not constitute the '*illah*' of an analogy. The general rule is that the '*illah*' must be definite and perceptible to the senses. For example, since the consent of parties to a contract is imperceptible in its nature, the law proceeds upon the act of offer and acceptance. Similarly the '*illah*' in establishing the paternity of a child is matrimonial cohabitation (*qiyām farāsh al-zawjiyyah*) or acknowledgement of paternity (*iqrār*), both of which are external phenomena and susceptible to evidence and proof. Since conception through conjugal relations between spouses is not an obvious phenomenon, it may not form the '*illah*' of paternity. On a similar note, the law adopts as the '*illah*' of legal majority, not the attainment of intellectual maturity, but the completion of a certain age, which is evident and susceptible to proof.⁴⁰

(3) The third condition of '*illah*' is that it must be a proper attribute (*al-waṣf al-munāsib*) in that it bears a proper and reasonable relationship to the law of the text (*ḥukm*). This relationship is *munāsib* when it serves to achieve the objective (*hikmah*) of the Lawgiver, which is to benefit the people and to protect them against harm. For example, killing is a proper ground on which to exclude an heir from inheritance. For the basis of succession is the tie of kinship which relates the heir to the deceased, which is severed and nullified by killing. Similarly, the intoxicating effect of wine is the proper cause of its prohibition. An attribute that does not bear a proper relationship to the *ḥukm* does not qualify as an '*illah*'.⁴¹

(4) The '*illah*' must be 'transient' (*muta'addī*), that is, an objective quality which is transferable to other cases. For analogy cannot be constructed on an '*illah*' which is confined to the original case only. As the Ḥanafīs explain, the very essence of '*illah*', as much as that of *qiyās* in general, is its capability of extension to new cases, which means that the '*illah*' must be a transferable attribute. Travelling, for example, is the '*illah*' of a concession in connection with fasting. As such, it is an '*illah*' which is confined to the *asl* and cannot be applied in the same way to other devotional acts (*ibādāt*). Similarly, if we were to confine the '*illah*' in the prohibition of intoxicants to wine derived from grapes, we would be precluding all the other varieties of intoxicants from the scope of the prohibition. Transferability (*ta'dīyah*)

of the effective cause is not, however, required by the Shāfi'is, who have validated *qiyās* on the basis of an 'illah that is confined to the original case (i.e. 'illah *qāshirah*). The Shāfi'is (and the Hanafi jurist Ibn al-Humām) have argued that *ta'diyah* is not a requirement of the 'illah: when the 'illah is confined to the original case, it is probable that the lawgiver had intended it as such. The probability may not be ignored merely for the lack of *ta'diyah*. It is a requirement which is intellectually conceived without due regard for the precise terms of the law itself. The Shāfi'is have further argued that the utility of the 'illah is not to be sought solely in its transferability. There is thus no inherent objection to the possibility of an 'illah being confined to the original case. The 'ulamā' are, however, in agreement that textually prescribed causes must be accepted as they are regardless of whether they are inherently transient or not.

The requirement of *ta'diyah* would imply that the 'illah of analogy must be an abstract quality and not a concrete activity or object. To illustrate this, we may again refer to the foregoing examples. Travelling, which is a concession in connection with fasting, is a concrete activity, whereas intoxication is an abstract quality that is not confined in its application. Similarly, in the *ḥadīth* regarding usury (*ribā*), the 'illah of its ruling, which prohibits quantitative excess in the sale of six specified articles, is the quality of such articles being saleable by the measurement of weight or capacity and not their particular species. The *ḥadīth* thus provides that 'gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt must be equal for equal, hand to hand'. Transactions in these commodities must, in other words, be without excess on either side and delivery shall be immediate, otherwise the transaction will amount to usury, which is forbidden. The 'illah of this prohibition is none of the concrete objects that are specified but an attribute or a concept that applies to all, namely their saleability by capacity or weight.⁴²

الذهب بالذهب والفضة بالفضة، والبر بالبر والشعير بالشعير
والتمر بالتمر والملح بالملح، مثلاً بمثل سواء بسواء يدا بيد.

(5) Finally, the effective cause must not be an attribute that runs counter to, or seeks to alter, the law of the text. To illustrate this we may refer to the story of a Mālikī judge who was asked by an Abbasid ruler about the penance (*kaffārah*) of having conjugal relations during daytime in Ramaḍān. The judge responded that the *kaffārah* in this

case was sixty days of fasting. This answer was incorrect as it sought to introduce a change in the text of the *ḥadīth* which enacted the *kaffārah* to be freeing a slave, or sixty days of fasting, or feeding sixty poor persons. The *fatwā* given by the judge sought to change this order of priority on the dubious assumption that freeing a slave (or feeding sixty persons) was an easy matter for a ruler and he should therefore be required to observe the fasting instead. The 'illah of the penance in this case is held to be the breaking of the fast itself and not any disrespect to the sanctity of Ramaḍān, nor having sexual intercourse with one's wife. The *fatwā* here was in line with the position taken by Imām Mālik in so far as it was held that the purpose of *kaffārah* was to inflict hardship. This was the underlying 'illah of that *fatwā*, which was admittedly appropriate (*munāsib*) to the ruling it contained, but it was invalid simply because the Lawgiver had overruled it by granting a choice in the *kaffārah* of fasting. The Mālikī school is also in agreement with other leading schools regarding the element of choice in the *kaffārah* of fasting. To give another example, suppose that someone issues a *fatwā* which entitles the daughter to an equal share of inheritance with the son, based on the specious 'illah that they are equal in respect of blood tie to the deceased. Equality in blood tie (*qarābah*) may seem an appropriate basis for 'illah in inheritance, but since the Lawgiver has overruled it by virtue of a clear text, the *fatwā* would be invalid simply because it seeks to alter the law of the text.⁴³

Our next discussion concerning the 'illah relates to the question of how the 'illah can be identified. Are there any methods that the jurists may utilise in his search for the correct cause or rationale of a given law?

IV.1 Identification of the 'Illah

The effective cause of a ruling may be clearly stated, or suggested by indications in the *naṣṣ*, or it may be determined by consensus. When the 'illah is expressly identified in the text, there remains no room for disagreement. Differences of opinion arise only in cases where the 'illah is not identified in the sources. An example of an 'illah that is expressly stated in the text occurs in *sūra al-Nisā* (4:43): 'O you believers! Do not approach *ṣalāh* while you are drunk.'

يا أيها الذين آمنوا لا تقربوا الصلاة وأنتم سكارى

This *ayāh* was revealed prior to the general prohibition of wine-drinking in *sūra al-Mā'idah* (5:93), but it provides, nevertheless, a clear reference to intoxication, which is also confirmed by the *ḥadīth* 'Every intoxicant is *khamr* and every *khamr* is forbidden'.⁴⁴

كل مسكر حمر وكل حمر حرام.

In another place, the Qur'an explains the effective cause of its ruling on the distribution of one-fifth of war booty to the poor and the needy 'so that the wealth does not accumulate in the hands of the rich' (*al-Hashr*, 59:7).

كي لا يكون دولة بين الأغنياء منكم

Instances are also found in the *ḥadīth* where the text itself identifies the rationale of its ruling. Thus the effective cause of asking for permission when entering a private dwelling is stated in the *ḥadīth* which says, 'Permission is required for the sake of what your sight may fall on [and which you are not permitted to see]'.⁴⁵

إنما جعل الأذن لأجل البصر.

The 'illah of asking for permission is thus to protect the privacy of the home against intrusion.⁴⁶ In these examples, the occurrence of certain Arabic expression such as *kay-lā* (so as not to), *li-ajil* (because of), etc., are associated with the concept of ratiocination (*ta'lil*) and provide definite indications of the 'illah of a given ruling.⁴⁶

Alternatively, the text that indicates the 'illah may be manifest *nass* (*al-nass al-zāhir*) which is in the nature of a probability, or an allusion (*al-īmā' wa'l-ishārah*). Indications of this type are also understood from the language of the text and the use of certain Arabic particles such as *li*, *fa*, *bi*, *anna* and *inna*, which are known to be associated with *ta'lil*. For example, in the Qur'ānic text (*al-Mā'idah*, 5:38): 'As to the thieves, male and female, cut off [*fā-qta'ū*] their hands'

السارق والسارقة فاقطعوا أيديهما

Theft itself is the cause of the punishment. Instances of this type are also found in *sūra al-Nūr* (24:2 and 4) regarding the punishment of adultery and false accusation respectively. In *Sūra al-Nisā'* (4:34) we find another example as follows: 'As for women whose rebellion

you fear, admonish them and leave them alone in their beds, and physically punish them.'

واللاتي يخافون نشوزهن فعضوهن واحجروهن في المضاجع

In this text, *nushūz* is the effective cause of the punishment.⁴⁷ The writers on *uṣūl* give numerous examples of instances where the Qur'an provides an indication, however indirect, as to the 'illah of its ruling.⁴⁸

The text of a *ḥadīth* may allude to the 'illah of its ruling. There is, for example, a *ḥadīth* stating that the saliva of cats is clean 'for they are usually around in the homes'.

إنما من الطوائف عليكم والطوافات.

Their domesticity, in other words, is the effective cause of the concession. Thus, by way of analogy, all domestic animals would be considered clean, unless it is indicated otherwise. And lastly, in the *ḥadīth* providing that, 'The judge who is in a state of anger may not adjudicate'

لا يقض القاضي وهو غضبان.

anger itself is the 'illah of the prohibition.⁴⁹ By analogy, the Companions have extended the ruling of this *ḥadīth* to anything that resembles anger in its effect, such as extreme hunger or depression.⁵⁰

Sometimes the word *sabab* is used as a substitute for 'illah. Although *sabab* is synonymous with 'illah and many writers have used it as such, *sabab* is normally reserved for devotional acts ('*ibādāt*) whose rationale is not perceptible to the human intellect. The text may sometimes provide an indication as to its *sabab*. Thus we find that *sūra al-Isrā'* (17:78) enjoins the believers to 'perform the *ṣalāh* from the setting of the sun until the dark of night'

أقم الصلاة لدلوك الشمس إلى غسق الليل

and the *sabab* (cause) of *ṣalāh* is the time when the *ṣalāh* is due. Since the cause of the ruling in this text is not discernable to human intellect, it is referred to as *sabab*, but not as an 'illah. From this distinction, it would appear that every 'illah is at the same time a *sabab*, but not every *sabab* is necessarily an 'illah.⁵¹

Next, the effective cause of a ruling may be established by consen-

sus. An example of this is the priority of full brothers over half-brothers in inheritance, the 'illah of which is held to be the former's superior tie with the mother. This ruling of *ijmā'* has subsequently formed the basis of an analogy according to which the germane brother is also given priority over the consanguine brother in respect of guardianship (*uṣūlāh*). *Ijmā'* has also determined the 'illah of the father's right of guardianship over the property of his minor child to be the minority of the child. Once again this right has, by analogy, been acknowledged for the grandfather.⁵² No *ijmā'* can, however, be claimed to exist in regard to the 'illah of the father's right of guardianship over the property of his minor daughter. While the majority of 'ulamā' consider the 'illah in this case to be minority, for the Shāfi'is, the 'illah in *ijbār* is virginity. The right of *ijbār* thus terminates upon loss of virginity even if the girl is still a minor.⁵³

When the 'illah is neither stated nor alluded to in the text, then the only way to identify it is through *ijtihād*. The jurist thus takes into consideration the attributes of the original case, and only that attribute which is considered to be proper (*munāsib*) is identified as the 'illah. For example, in the *ḥadīth* referred to above concerning the penance of conjugal relations during daytime in Ramaḍān, it is not precisely known whether the 'illah of penance is the breaking of the fast (*ifṭār*), or sexual intercourse. Although intercourse with one's wife is lawful, it may be that in this context it is regarded as a form of contempt for the sanctity of Ramaḍān. But it is equally reasonable to say that intercourse in this context is no different to other forms of *ifṭār*, in which case it is the *ifṭār* itself that is the 'illah of the penance.⁵⁴ The method of reasoning which the *mujtahid* employs in such cases is called *tanqīḥ al-manāṭ*, or isolating the 'illah, which is to be distinguished from two other methods referred to as *takhrīj al-manāṭ* (extracting the 'illah) and *taḥqīq al-manāṭ* (ascertaining the 'illah) respectively. This process of enquiry is roughly equivalent to what is referred to by some 'ulamā' of *uṣūl* as *al-sidr wa'l-taqṣīm*, or elimination of the improper, and assignment of the proper, 'illahi to the *ḥukm*.

Tanqīḥ al-manāṭ implies that a ruling may have more than one cause, and the *mujtahid* has to identify the one that is proper (*munāsib*), as was the case in the foregoing examples. Literally, *tanqīḥ* means 'connecting the new case to the original case by eliminating the discrepancy between them' (*ilḥāq al-far' bi'l-aṣl bi-ḥiṣṣat al-fāriq*).⁵⁵

Tanqīḥ al-manāṭ is thus mainly concerned with identifying the correct 'illah from a range of attributes that are indicated in the text. In this sense, *tanqīḥ al-manāṭ* is almost exclusively concerned with the

textually indicated 'illah and the *mujtahid* ascertains the most appropriate of the various alternatives. To give an example, we may refer to the *ḥadīth* in which a bedouin came to the Prophet and said: 'I had deliberate conjugal relations with my wife in daytime in Ramaḍān. Then the Prophet said to him, "Manumit a slave."'

واقعت أهلي في نهار رمضان عامدا، فقال النبي
صلى الله عليه وسلم: إعتق رقبة.

The text here indicates several possibilities to identify the 'illah, some of which are not appropriate to the ruling it contains. The fact, for example, that he was a bedouin is not relevant to the *ḥukm*, nor the fact that he had intercourse with his wife (not with a stranger, that is). The effective 'illah is, therefore, deliberate intercourse in the daytime of the fasting month and this is the only cause for the expiation (*kaffārāh*) that is prescribed in the *ḥadīth*. When the *mujtahid* has isolated this as the effective cause, he has completed the procedure that is involved in *tanqīḥ al-manāṭ*.⁵⁶

Extracting the 'illah, or *takhrīj al-manāṭ*, is in fact the starting point in the enquiry into the identification of 'illah, and often precedes *tanqīḥ al-manāṭ*. In all cases where the text or *ijmā'* does not identify the effective cause, the jurist extracts it by looking at the relevant causes via the process of *ijtihād*. He may identify more than one cause, in which case he has completed one step involved in *takhrīj al-manāṭ* and must move on to the next stage, which is to isolate the proper cause. To illustrate this, the prohibition of usury (*ribā*) in wheat and five other articles is laid down in the *ḥadīth*. When the jurist seeks to draw an analogy between wheat and raisins – to determine for example whether one should apply the tax of one-tenth by analogy to raisins – the 'illah may be any of the following: that both of them sustain life; that they are edible; that they are both grown in the soil; or that they are sold by measure. Thus far the jurist has completed the first step, namely extracting the 'illah. But then he proceeds to eliminate some of these by recourse to *tanqīḥ al-manāṭ*. The first 'illah is eliminated because salt, which is one of the six articles, does not sustain life; the second is also eliminated because gold and silver are not edible; and so is the third as neither salt nor precious metals are grown in the soil. The 'illah is therefore the last attribute, which belongs to all the specified items in the *ḥadīth* of *ribā*. The difference between the two stages of reasoning is that in *takhrīj al-manāṭ*, the jurist is dealing with

a situation where the 'illah is not identified, whereas in *taḥqīq al-manāṭ*, more than one cause has been identified and his task is to select the proper 'illah.³⁷

Ascertaining the 'illah, or *taḥqīq al-manāṭ*, follows the two preceding stages of investigation in that it consists of ascertaining the presence of an 'illah in individual cases. For the purpose of drawing an analogy between wine and a herbal drink, for example, the investigation that leads to the conclusion that the substance in question has the intoxicating quality in common with wine is in the nature of *taḥqīq al-manāṭ*. Similarly, in the case of drawing an analogy between a thief and a pickpocket, the investigation as to whether or not the latter falls under the definition of theft is in the nature of *taḥqīq al-manāṭ*. Finding proof, in other words, that the given 'illah in the *aṣl* which is already extracted and isolated, whether textually indicated or arrived at through inference and *ijtihād*, is present also in the *far'*, is in the nature of *taḥqīq al-manāṭ*. To give another example, suppose that two disputing parties agree that the 'illah of the prohibition of *ribā* in barley is that it sustains life, but they are in doubt about whether this quality is also present in figs. When they are able to confirm by necessary evidence that figs also possess the same quality, their investigation will have been made in the nature of *taḥqīq al-manāṭ*.³⁸

To illustrate all three steps at issue, we refer again to the *ḥadīth* in which a bedouin Arab came to the Prophet in Medina and confessed that he had had deliberate conjugal relations with his wife during the day in Ramaḍān. The Prophet then ordered him to pay the specified *kaffārah* (expiation) for his violation. The text of this *ḥadīth* does not clarify the precise 'illah for the expiation. Was it because the incident took place in the holy month of Ramaḍān, or in Medina, or because the perpetrator was an Arab or a bedouin, or because the actual 'illah was none of these and the *kaffārah* was imposed simply because of the deliberate breaking of the fast? By the time the *mujtahid* has explored these various possibilities in order to identify the precise 'illah, he has completed the step involved in *taḥqīq al-manāṭ*. Then, finally, the investigation into whether sexual activity, like eating food, satisfies a bodily desire, and therefore resembles eating and drinking in relationship to fasting, is in the nature of *taḥqīq al-manāṭ*.³⁹

V. Varieties of Qiyās

From the viewpoint of the strength or weakness of the 'illah, the Shāfi'ī jurists have divided *qiyās* into three types.

(1) 'Analogy of the superior' (*qiyās al-awḥā*). The effective cause in this *qiyās* is more evident in the new case than the original case, which is why it is called *qiyās al-awḥā*. For example, we may refer to the Qur'ānic text in *sūra al-Isrā'* (17:23) which provides regarding parents: 'Say not to them "Fie" nor repulse them, but address them in dignified terms.'

فلا تقل لهما أف ولا تنهرهما وقل لهما قولا كريما

By analogy it may be deduced that the prohibition against lashing or beating them is even more obvious than verbal abuse. Similarly, the penance (*kaffārah*) for unintentional killing is, by way of analogy, applicable to intentional killing as the transgression that entails the *kaffārah* is even more evident in the latter. This is the Shāfi'ī view, but the Ḥanafīs do not consider the first example to be a variety of *qiyās* but a mere implication of the text (*dalālah al-naṣṣ*) which falls within the scope of interpretation rather than analogy. Likewise, the Ḥanafīs do not require *kaffārah* for deliberate killing, a ruling that has been determined on grounds of interpretation rather than *qiyās*.⁶⁰

(2) 'Analogy of equals' (*qiyās al-musāwī*). The 'illah in this type of *qiyās* is equally effective in both the new and the original cases, as is the ruling that is deduced by analogy. We may illustrate this by reference to the Qur'ān (*al-Nisā'*, 4:2), which forbids 'devouring the property of orphans'. By analogy, it is concluded that all other forms of destruction and mismanagement which lead to the loss of such property are equally forbidden. But this is once again regarded by the Ḥanafīs to fall within the scope of interpretation rather than analogy. To give another example, according to a *ḥadīth*, a container which is licked by a dog must be washed seven times.

إذا ولغ الكلب في إناء فأغسلوه سبع مرات.

The Shāfi'ī extend the same ruling by analogy to a container licked by swine. The Ḥanafīs, however, do not allow this *ḥadīth* in the first place.⁶¹

(3) 'Analogy of the inferior' (*qiyās al-adnā*). The effective cause in this form of *qiyās* is less clearly effective in the new case than in the original. Hence it is not quite so obvious whether the new case falls under the same ruling that applies to the original case. For example, the rules of *ribā* prohibit the exchange of wheat and other specified commodities unless the two amounts are equal and delivery is

immediate. By analogy this rule is extended to apples, since both wheat and apples are edible (according to Shāfi'i jurists) and measurable (according to Hanafi jurists). But the 'illah of this *qiyās* is weaker in regard to apples which, unlike wheat, are not a staple food.⁶³

This type of *qiyās* is unanimously accepted as *qiyās* proper but, as stated earlier, the Hanafis and some Zāhiris consider the first two varieties to fall within the meaning of the text. It would appear that the Hanafis apply the term '*qiyās*' only to that type of deduction which involves a measure of *ijtihād*. The first two varieties are too direct for the Hanafis to be considered instances of *qiyās*.⁶³

Qiyās has been further divided into two types, namely 'obvious analogy' (*qiyās jalī*) and 'hidden analogy' (*qiyās khafī*). This is mainly a Hanafi division. In the former, the equation between the *asl* and *far'* is obvious and the discrepancy between them is removed by clear evidence. An example of this is the equation the 'ulamā' have drawn between the male and the female slave with regard to the rules of manumission. Thus if two persons jointly own a slave and one of them sets the slave free to the extent of his own share, it is the duty of the imam to pay the other part-owner his share and release the slave. This ruling is explicit regarding the male slave, but by an 'obvious analogy' the same rule is applied to the female slave. The discrepancy of gender in this case is of no consequence in regard to their manumission.⁶⁴

The 'hidden analogy' (*qiyās khafī*) differs from the 'obvious analogy' in that the removal of discrepancy between the *asl* and the *far'* is by means of a prohibition (*zamm*). Shawkānī illustrates this with a reference to the two varieties of wine, namely *nabīdh* and *khamr*. The former is obtained from dates and the latter from grapes. The rule of prohibition is analogically extended to *nabīdh* despite some discrepancy that might exist between the two.⁶⁵ Another example of *qiyās khafī* is the extension, by the majority of the 'ulamā' (except the Hanafis), of the prescribed penalty of *zīna* to sodomy, despite the measure of discrepancy known to exist between the two cases. And finally, the foregoing analysis would suggest that *qiyās khafī* and *qiyās al-adnā* are substantially concurrent.

VI. Proof (*Hujjiyyah*) of *Qiyās*

Notwithstanding the absence of a clear authority for *qiyās* in the Qur'ān, the 'ulamā' of the four Sunni schools and the Zaydi Shi'ah have validated *qiyās* and quoted several Qur'anic passages in support of their views. Thus, a reference is made to sūra al-Nisā' (4:59) which

reads, in an address to the believers, 'Should you dispute over something, refer it to God and to the Messenger, if you do believe in God.'

فإن تنازعتم في شيء فردوه إلى الله والرسول إن كنتم
تؤمنون بالله

The proponents of *qiyās* have reasoned that a dispute can only be referred to God and to the Prophet by following the signs and indications that we find in the Qur'ān and the *Sunnah*. One way of achieving this is to identify the rationale of the *ahkām* and apply them to disputed matters, and this is precisely what *qiyās* is all about.⁶⁶ The same line of reasoning has been advanced with regard to a text in sūra al-Nisā' (4:150) which proclaims: 'We have sent to you the Book with the Truth so that you may judge people by means of what God has shown you.'

إنا أنزلنا إليك الكتاب بالحق لتحكم بين الناس بما أراك الله

A judgement may thus be based on the guidance that God has clearly given or on that which bears close similarity to it.⁶⁷ The Qur'ān often indicates the rationale of its laws either explicitly or by reference to its objectives. The rationale of retaliation, for example, is to protect life, and this is clearly stated in the text (al-Baqarah, 2:79). Likewise, the rationale of *zakāh* is to prevent the concentration of wealth in a few hands, which is clearly stated in the Qur'ān (al-Hashr, 59:7). Elsewhere in the Qur'ān, we read in a reference to the permissibility of *tayammum* (ablution with sand in the absence of water) that 'God does not intend to impose hardship on you' (al-Mā'idah, 5:6).

ما يريد الله ليجعل عليكم من حرج

In all these instances, the Qur'ān provides clear indications that call for recourse to *qiyās*. In the absence of a clear ruling in the text, *qiyās* must still be utilised as a means of achieving the general objectives of the Lawgiver. It is thus concluded that the indication of causes and objectives, similitudes and contrasts, would be meaningless if they were not observed and followed as a guide for conduct in the determination of the *ahkām*.⁶⁸

The proponents of *qiyās* have further quoted, in support of their

views, a verse in sūra al-Hashr (59:2) which enjoins: 'Consider, O you possessors of eyes!'

فَاعْتَبِرُوا يَا أُولِيَ الْأَبْصَارِ

'Consideration' in this context means attention to similitudes and comparisons between similar things. Two other *āyāt* that are variously quoted by the '*ulamā*' occur in sūra al-Nāzi'āt, that 'there is a lesson in this for one who fears' (79:26);

إِنْ فِي ذَلِكَ لَعِبْرَةٌ لِمَنْ يَخْشَى

and in Āl-Imrān (3:13) which tells us that 'in their narratives there was a lesson for those who possessed vision'.

إِنْ فِي ذَلِكَ لَعِبْرَةٌ لَأُولِيَ الْأَبْصَارِ

There are two types of indication in the *Sunnah* to which the proponents of *qiyās* have referred:

(1) *Qiyās* is a form of *ijtihād*, which is expressly validated in the *hadīth* of Mu'adh ibn Jabal. It is reported that the Prophet asked Mu'adh, upon the latter's departure as judge to the Yemen, questions in answer to which Mu'adh told the Prophet that he would resort to his own *ijtihād* in the event that he failed to find guidance in the Qur'ān and the *Sunnah*, and the Prophet was pleased with this reply. Since the *hadīth* does not specify any form of reasoning in particular, analogical reasoning falls within the meaning of this *hadīth*.⁶⁹

لَمَّا أَرَادَ الرَّسُولُ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنْ يَبْعَثَ

مَعَاذَ بْنِ جَبَلٍ إِلَى الْيَمَنِ ، قَالَ لَهُ :

كَيْفَ تَقْضِي إِذَا عَرَضَ لَكَ الْقَضَاءُ ؟ قَالَ : أَقْضِي بِكِتَابِ اللَّهِ ،

فَإِنْ لَمْ أَجِدْ فَيَسَنَةَ رَسُولِ اللَّهِ ، فَإِنْ لَمْ أَجِدْ أَجْتَهِدُ بِرَأْيِي وَلَا الْوَلَاةِ .

فَضْرَبَ رَسُولُ اللَّهِ عَلَى صَدْرِهِ وَقَالَ : الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ

رَسُولَ اللَّهِ إِلَى مَا يَرْضِي رَسُولَ اللَّهِ .

(2) The *Sunnah* provides evidence that the Prophet resorted to analogical reasoning on occasions when he did not receive a revelation on a particular matter. On one such occasion, a woman called Khath'amīyah came to him and said that her father had died without performing the *hajj*. Would it benefit him if she performed the *hajj* on her father's behalf? The Prophet asked her: 'Supposing your father had a debt to pay and you pay it on his behalf, would this benefit him?' To this her reply was in the affirmative, and the Prophet said, 'The debt owed to God merits even greater consideration.'⁷⁰

قَوْلُهُ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - لِلْمُتَعَمِّمَةِ : أَرَأَيْتَ لَوْ كَانَ

عَلَى أَبِيكَ دَيْنٌ فَقَضَيْتَهُ أَكَانَ يَنْفَعُهُ ذَلِكَ ؟ قَالَتْ : نَعَمْ ،

فَقَالَ لَهَا : فَدَيْنَ اللَّهِ أَحَقُّ بِالْقَضَاءِ .

It is also reported that 'Umar ibn al-Khaṭṭāb asked the Prophet whether kissing vitiates the fast during Ramaḍān. The Prophet asked him in return: 'What if you gargle with water while fasting?' 'Umar replied that this did not matter. The Prophet then told him that 'the answer to your first question is the same'.⁷¹

The Companions are said to have reached a consensus on the validity of *qiyās*. We find, for example, that the first caliph, Abū Bakr, drew an analogy between father and grandfather in respect of their entitlements in inheritance. Similarly, 'Umar ibn al-Khaṭṭāb is on record as having ordered Abū Mūsā al-Ash'arī 'to ascertain the similitudes for purposes of analogy'.⁷² Furthermore, the Companions pledged their fealty (*bay'ah*) to Abū Bakr on the strength of the analogy that 'Umar drew between two forms of leadership: 'Umar asked the Companions, 'Will you not be satisfied, as regards worldly affairs, with the man with whom the Prophet was satisfied as regards religious affairs?' And they agreed with 'Umar, notwithstanding the fact that the issue of succession was one of the utmost importance.⁷³ Again, when the Companions held a council to determine the punishment of wine-drinking, 'Alī ibn Abī Tālib suggested that the penalty of false accusation should be applied to the wine drinker, reasoning by way of analogy: 'When a person gets drunk, he raves and when he raves, he accuses falsely'.⁷⁴ It is thus concluded that *qiyās* is validated by the Qur'ān, the *Sunnah* and the *ijmā*' of the Companions.

VII. The Argument against the *Qiyās*

This has been advanced mainly by the *Zāhiri* school and some *Mu'tazilah*, including their leader, *Ibrāhīm al-Nazzām*. The leading *Zāhiri* jurist, *Ibn Ḥazm*, is the most outspoken against *qiyās*. The main points of his argument may be summarised as follows:

(1) The rules of the *Sharī'ah* are conveyed in the form of commands and prohibitions. There are also the intermediate categories of 'recommended' (*mandūh*) and 'reprehensible' (*makrūh*), which are essentially two varieties of *mubāh* (permissible). There are thus only three types of *ahkām*: command, prohibition and permissibility. Should there be no clear text in respect of any matter, then it falls under the principles of *ibāhah* (permissibility) which is established in the *Qur'ān*.⁷⁵ Commands and prohibitions are determined by the clear authority of the *Qur'ān*, the *Sunnah* or *ijmā'*, in whose absence nothing else can determine an obligatory or prohibitory injunction, and the matters will automatically fall into the category of *mubāh*. There is thus no room for analogy in the determination of the *ahkām*.⁷⁶

(2) The supporters of analogy, according to *Ibn Ḥazm*, proceed on the assumption that the *Sharī'ah* fails to provide a *naṣṣ* for every matter, an assumption which is contrary to the explicit provisions of the *Qur'ān*. *Ibn Ḥazm* goes on to quote the following to this effect: 'We have neglected nothing in the Book' (*al-An'ām*, 6:38)

ما فرطنا في الكتاب من شيء

and 'We revealed the Book as an explanation for everything' (*al-Nahl*, 16:89).

وأنزلنا عليك الكتاب تبينا لكل شيء

In yet another passage, we read in the *Qur'ān*: 'This day, I perfected your religion for you, and completed my favour upon you' (*al-Mā'idah*, 5:3).

اليوم أكملت لكم دينكم وأتممت عليكم نعمتي

Since the *ahkām* of the lawgiver are all-inclusive and provide complete guidance for all events, our only duty is to discover and implement them. To consider *qiyās* to be an additional proof is tantamount to

an acknowledgement that the *Qur'ān* fails to provide complete guidance.⁷⁷

(3) *Qiyās* derives its justification from an '*illah*' which is common to both the original and the new case. The '*illah*' is either indicated in the text, in which case the ruling is derived from the text itself and *qiyās* is redundant; or alternatively, where the '*illah*' is not indicated, there is no way of knowing it for certain; *qiyās* therefore rests on conjecture, which must not be allowed to form the basis of a legal ruling. This is, according to *Ibn Ḥazm*, the purport of the *Qur'ānic āyah* (*al-Najm*, 53:28) which proclaims that 'conjecture avails nothing against the truth'.

وإن الظن لا يغني من الحق شيئا

Identifying the '*illah*' in *qiyās* is an exercise in speculation, whereas the *Qur'ān* enjoins us to 'pursue not that of which you have no knowledge' (*al-Isrā'*, 17:36).⁷⁸

ولا تقف ما ليس لك به علم

(4) And lastly, *Ibn Ḥazm* holds that *qiyās* is clearly forbidden in the *Qur'ān*.⁷⁹ Thus we read in *sūra al-Hujarāt* (49:1): 'O you believers! Do not press forward before God and His Messenger, and fear God'

يا أيها الذين آمنوا لا تقدموا بين يدي الله ورسوله واتقوا الله

Which means that the believers must avoid legislating on matters on which the Lawgiver has chosen to remain silent. The same point is conveyed in the *ḥadīth* where the Prophet ordered the believers:

Ask me not about matters that I have not raised. Nations before you were faced with destruction because of excessive questioning and disputation with their prophets. When I command you to do something, do it to the extent that you can, and avoid what I have forbidden.⁸⁰

دعوني ما تركتكم، فإنما هلك من كان قبلكم بكثرة مسائلهم

واختلافهم على نبيهم، فإذا أمرتكم بشيء فأتوا منه ما

استطعتم وإذا نهيتكم عن شيء فاجتنبوه.

Thus in regard to matters on which the *nass* is silent, it is not proper for a Muslim to take the initiative in issuing a *hukm*, for he is ordered not to do so. *Qiyās* therefore violates the express terms of the Qur'an and the *Sunnah*.

To sum up, Ibn Hazm's argument is based on two main points, one of which is that the *nuṣūṣ* of the Qur'an and the *Sunnah* provide for all events, and the other is that *qiyās* is an unnecessary addition to the *nuṣūṣ*. Regarding the first point, the majority of 'ulamā' hold the view that the *nuṣūṣ* do admittedly cover all events, either explicitly or through indirect indications. However, the Zāhirīs rely only on the explicit *nuṣūṣ* and not on these indirect indications. The majority, on the other hand, go beyond the confines of literalism and validate *qiyās* in the light of the general objectives of the *Sharī'ah*. For the majority, *qiyās* is not an addition or a superimposition on the *nuṣūṣ*, but their logical extension. Hence the Zāhirī argument that *qiyās* violates the integrity of the *nuṣūṣ* is devoid of substance.⁸¹

With reference to some of the Qur'anic passages that the opponents of *qiyās* have quoted, especially on the use of speculative evidence in law, it is contended that the *āyāt* in question forbid recourse to speculation (*ẓann*) in matters of belief only. As for the practical rules of *fiqh*, most of them partake of *ẓann*, and a great deal of the *nuṣūṣ* are themselves speculative in their purport and implication (*ẓannī al-dalālah*). But this does not necessarily mean that action upon them must be suspended. On the contrary, a measure of diversity and variation in the practical rules of the *Sharī'ah* is not only tolerated, it is considered a sign of the bounty of Almighty God, and the essence of flexibility in the *Sharī'ah*.⁸²

In principle, the Shī'ah Imāmiyyah do not recognise the validity of *qiyās*, as they maintain that *qiyās* is pure conjecture which must be avoided. In addition, the Qur'an, the *Sunnah* and the rulings of the imams, according to the Shī'ī 'ulamā', provide sufficient guidance for conduct, and any reference to analogy is unnecessary and unwarranted.⁸³ This is definitely the view of the Akhbārī branch of the Twelver Shī'ah, whose refutation of *qiyās* closely resembles that of the Zāhirīs. But the Uṣūlī branch of the Shī'ah validate action upon certain varieties of *qiyās*, namely *qiyās* whose 'illah is explicitly stated in the text (*qiyās manṣūṣ al-'illah*), analogy of the superior (*qiyās al-awla*) and obvious analogy (*qiyās jāli*). These varieties of *qiyās*, in their view, are not mere speculations; they either fall within the meaning of the text or else constitute a strong probability (*al-ẓann al-qawī*) which may be adopted as a guide for conduct. But they

validate this through recourse to *ijtihād* and 'aql rather than to *qiyās per se*.⁸⁴

VIII. Qiyās in Penalties

The 'ulamā' of the various schools have discussed the application of *qiyās* to juridical, theological, linguistic, rational and customary matters, but the main question that needs to be discussed here is the application of analogy in regard to prescribed penalties (*hudūd*) and penances (*kaffārāt*).

The majority of 'ulamā' do not draw any distinction in this respect, and maintain the view that *qiyās* is applicable to *hudūd* and *kaffārāt* in the same way as it is to other rules of the *Sharī'ah*. This is explained by reference to the Qur'anic passages and the *hadith* that are quoted in support of *qiyās*, which are all worded in absolute terms, none drawing any distinction in regard to penalties: and since the evidence in the sources does not impose any restriction on *qiyās*, it is therefore applicable in all spheres of the *Sharī'ah*.⁸⁵ An example of *qiyās* in regard to the *hudūd* is the application of the punishment of theft to the *nabbāsh*, or thief who steals the shroud of the dead, as the common 'illah between them is taking away the property of another without his knowledge. A *hadith* has also been quoted in support of this ruling.⁸⁶ Similarly, the majority of the 'ulamā' (excluding the Hanafīs) have drawn an analogy between *zinā* and sodomy, and apply the *hadd* of the former by analogy to the latter.⁸⁷

The Hanafīs are in agreement with the majority to the extent that *qiyās* may validly operate in regard to *ta'zīr* penalties, but they have disagreed with the application of *qiyās* to the prescribed penalties and *kaffārāt*. They would not, for example, approve of an analogy between abusive words (*sabb*) and false accusation (*qadhif*), nor would they extend the *hadd* of *zinā* by analogy to other sexual offences. These, according to the Hanafīs, may be penalised under *ta'zīr* but not by analogy with the *hudūd*. The main reason that the Hanafīs have given is that *qiyās* is founded on the 'illah, whose identification in regard to the *hudūd* involves a measure of speculation and doubt. There is a *hadith* that provides: 'Drop the *hudūd* in case of doubt as far as possible. If there is a way out, then clear the way, for in penalties, if the imam makes an error on the side of leniency, it is better than making an error on the side of severity.'⁸⁸

إدروا الحدود عن المسلمين ما استطعتم ، فإن كان له مخرج
فخلوا سبيله ، فإن الإمام إن يخطئ في العفو خير من أن
يخطئ في العقوبة .

It is thus concluded that nay level of doubt is ascertaining the 'illah of *hadd* penalties must prevent their analogical extension to similar cases.⁹⁰

As stated above, the majority validate the application of *qiyās* in regard to *kaffārāt*. Thus the analogy between the two forms of breaking the fast (*ifṭār*), namely deliberate eating during the month of Ramaḍān and breaking the fast by having sexual intercourse, would extend the *kaffārāt* of the latter to the former. Similarly, the majority have validated the analogy between deliberate killing and unintentional killing for the purposes of *kaffārāt*. The Qur'ān only prescribes a *kaffārāt* for erroneous killing, and this is extended by analogy to deliberate homicide. The common 'illah between them is the killing of another human being. If *kaffārāt* is required in erroneous killing, then by way of superior analogy (*qiyās al-aulā*) the 'illah is even more evident in the case of a deliberate killing. Both are therefore liable to the payment of *kaffārāt*, which is releasing a slave, or two months fasting, or feeding sixty persons. The Hanafis are once again in disagreement with the majority on this, as they maintain that, for the purposes of analogy, the *kaffārāt* resembles the *hadd*. Since doubt cannot be totally eliminated in the identification of their effective causes, *kaffārāt* may not be extended by means of analogy.⁹¹

Notwithstanding the fact that the jurists have disagreed on the application of *qiyās* in penalties, it will be noted that the 'ulamā' have on the whole discouraged recourse to *qiyās* in the field of criminal law. Consequently, there is very little actual *qiyās* to be found in this field. This is also the case in modern law, which discourages analogy in respect of penalties. The position is somewhat different in regard to civil transactions (*mu'āmalāt*), in which *qiyās* is generally permitted.⁹²

IX. Conflicts between *Naṣṣ* and *Qiyās*

Since the 'illah in analogy is a general attribute that applies to all similar cases, there arises the possibility of *qiyās* coming into conflict with the *naṣṣ*. The question to be asked is how such a conflict should

be removed. Responding to this question, the 'ulamā' have held to different views, which may be summarised as follows:

(1) According to Imām Shāfi'i, Aḥmad Ibn Ḥanbal and one view which is attributed to Abū Ḥanīfah, whenever there is a *naṣṣ* on a matter, *qiyās* is absolutely redundant. *Qiyās* is only applicable when no explicit ruling can be found in the sources. Since recourse to *qiyās* in the presence of *naṣṣ* is *ultra vires* in the first place, the question of a conflict arising between the *naṣṣ* and *qiyās* is therefore of no relevance.⁹³

(2) The second view, which is mainly held by the Mālikis, also precludes the possibility of a conflict between *qiyās* and a clear text, but does not dismiss the possibility of a conflict arising between a speculative text and *qiyās*. Analogy could, according to this view, come into conflict with the 'āmm of the Qur'ān and the solitary *ḥadīth*.

The Hanafis have maintained that the 'āmm is definitive in implication (*qaf'i al-dalālah*), whereas *qiyās* is speculative. As a rule, a speculative item cannot qualify a definitive one, which would mean that *qiyās* does not specify the 'āmm of the Qur'ān. The only situation where the Hanafis envisage a conflict between *qiyās* and the 'āmm of the Qur'ān is where the 'illah of *qiyās* is stated in a clear *naṣṣ*. For in this case, a conflict between the 'āmm of the Qur'ān and *qiyās* would be that of one *qaf'i* with another. However, for the most part *qiyās* is speculative evidence, and as such may not specify the 'āmm of the Qur'ān. But once the 'āmm is specified, on whatever grounds, then it becomes speculative itself, at least in respect of that part which remains unspecified. After the first instance of specification (*takhsīs*), in other words, the 'āmm becomes speculative, and is then open to further specification by means of *qiyās*. For example, the word *bay'* (sale) in the Qur'ānic text stating that 'God has permitted sale and prohibited usury' (al-Baqarah, 2:275)

وأحل الله البيع وحرم الربا

is 'āmm, but has been qualified by solitary *ḥadīth* which prohibit certain types of sale. Once the text has been so specified, it remains open to further specification by means of *qiyās*.⁹⁴

This was the Hanafi view of conflict between a general text and *qiyās*. But the Mālikis, who represent the majority view, consider the 'āmm of the Qur'ān to be speculative in the first place. The possibility is therefore not ruled out, according to the majority, of a conflict

arising between the *naṣṣ* and the *qiyās*. In such an event, the majority would apply the rule that one speculative principle may be specified by another. Based on this analysis, *qiyās*, according to most of the jurists, may specify the 'āmm of the Qur'ān and the *Sunnah*.⁹⁴

As for the conflict between *qiyās* and a solitary *ḥadīth*, it is recorded that Imām Shāfi'ī, Ibn Ḥanbal and Abū Ḥanīfah do not give priority to *qiyās* over such a *ḥadīth*. An example of this is the vitiation of ablution (*wuḍū'*) by loud laughter during the performance of *ṣalāh*, which is the accepted rule of the Hanafī school despite its being contrary to *qiyās*. Since the rule here is based on the authority of a solitary *ḥadīth*, the latter has been given priority over *qiyās*, for *qiyās* would only require vitiation of the *ṣalāh*, not the *wuḍū'*.⁹⁵

روي عن النبي - صلى الله عليه وسلم - أنه أمر رجلا ضحك
بالصلاة أن يعيد الوضوء والصلاة.

Although the three imams are in agreement on the principle of giving priority to solitary *ḥadīth* over *qiyās*, regarding this particular *ḥadīth*, only the Hanafīs have upheld it. The majority, including Imām Shāfi'ī, consider it to be *mursal* and do not act on it.

Additionally, there are other views on the subject which merit brief attention. Abū al-Ḥusayn al-Baṣrī, for example, divided *qiyās* into four types, as follows:

(1) *Qiyās* which is founded on a decisive *naṣṣ*, that is, when the original case and the effective cause are both stated in the *naṣṣ*. This type of *qiyās* takes priority over a solitary *ḥadīth*.

(2) *Qiyās* which is founded on speculative evidence, that is, when the *aṣl* is a speculative text and the 'illah is determined through logical deduction (*istinbāṭ*). This type of *qiyās* is inferior to a solitary *ḥadīth* and the latter takes priority over it. Al-Baṣrī has claimed an *ijmā'* on both one and two above.

(3) *Qiyās* in which both the *aṣl* and the 'illah are founded on speculative *nuṣūṣ*, in which case it is no more than a speculative form of evidence and, should it conflict with a solitary *ḥadīth*, the latter takes priority. On this point, al-Baṣrī quotes Imām al-Shāfi'ī in support of his own view.

(4) *Qiyās* in which the 'illah is determined through *istinbāṭ* but whose *aṣl* is a clear text of the Qur'ān or *mutawātir ḥadīth*. This type of *qiyās* is stronger than two and three above, and the 'ulamā' have differed on whether it should take priority over a solitary *ḥadīth*.⁹⁶

The Mālikīs, and some Ḥanbalī 'ulamā', are of the view that in the event of a conflict between a solitary *ḥadīth* and *qiyās*, if the latter can be substantiated by another principle or *aṣl* of the *Sharī'ah*, then it will take priority over a solitary *ḥadīth*. If, for example, the 'illah of *qiyās* is 'removal of hardship', which is substantiated by several texts, then it will add to the weight of *qiyās*, and the latter will take priority over a solitary *ḥadīth*. For this kind of evidence is itself an indication that the *ḥadīth* in question is weak in respect of authenticity.⁹⁷ Similarly, some Hanafīs have maintained that when a solitary *ḥadīth*, which is in conflict with *qiyās*, is supported by another *qiyās*, then it must be given priority over the conflicting *qiyās*. This is also the view that Ibn al-'Arabi has attributed to Imām Mālik, who is quoted to the effect that whenever a solitary *ḥadīth* is supported by another principle, then it must take priority over *qiyās*. But if no such support is forthcoming, the solitary *ḥadīth* must be abandoned. For example, the following *ḥadīth* has been found to be in conflict with another principle: 'When a dog licks a container, wash it seven times, one of which should be with clean sand.'⁹⁸

إذا ولغ الكلب في إناء فاعسلوه سبع مرات.

It is suggested that this solitary *ḥadīth* is in conflict with the permissibility of eating the flesh of game that has been fetched by a hunting dog. The game is still lawful for consumption, notwithstanding its having come into contact with the dog's saliva. There is, on the other hand, no other principle that could be quoted in support of either of the two rulings, so *qiyās* takes priority over the solitary *ḥadīth*. Our second example is of a solitary *ḥadīth* that is in conflict with one principle but stands in accord with another. This is the *ḥadīth* of 'arāyā, which provides that 'the Prophet (upon whom be peace) permitted the sale of dates on the palm tree for its equivalent in dry dates'.

عن زيد بن ثابت (رض) أن رسول الله - صلى الله عليه وسلم - رخص في العريّة.

This is permitted despite its being in conflict with the rules of *nibā'*. However, the permissibility in this case is supported by the principle of *daf' al-ḥaraj* or 'removal of hardship' in that the transaction of 'arāyā was permitted in response to a need and, as such, it

takes priority over the *qiyās* which might bring it under the rules of *ribā*.⁹⁹

Conclusion

Qiyās has always been seen as the main vehicle of *ijtihād*, so much so that Imām al-Shāfi'i considered *qiyās* and *ijtihād* as two words with the same meaning. A substantive principle of *uṣūl-al-fiqh*, *qiyās* really ranks third among the hierarchy of proofs next to the Qur'ān and the *Sunnah*. *Ijmā'*, although given third place in the hierarchy of proofs, is basically a procedural, rather than substantive, principle and, important as it is, it has no methodological juristic corpus of its own. The history of early Islamic juristic thought is closely aligned with analogical reasoning, with the obvious purpose of extending the letter and spirit of the text to all cases that fall within its broader purpose and rationale. We also note, however, that *qiyās* saw its heyday in earlier times when the scope was wide open for legal development. But since *qiyās* is tied to the text, it is not an interminable source and the scope for its application has been progressively narrowed, and new developments through *qiyās* have become increasingly limited. There are a few cases or examples of *qiyās* in the works either of *fiqh* or *uṣūl al-fiqh*. Modern textbooks on *uṣūl* often reproduce and repeat the same examples that were known to the '*ulamā*' of earlier centuries. This may partly explain why the conventional methodology of *qiyās* has come under criticism for being too restrictive to serve the purpose of reconstruction and *ijtihād* in modern times. *Qiyās* should, as a matter of principle, be attempted only when no ruling concerning a new issue can be found in a clear text. *Qiyās* is therefore expected to extend the law to new territories and serve as a vehicle for enhancing and enriching the existing law. Turābī has observed that 'the conventional *qiyās* [*al-qiyās al-taqlīdī*] is a restrictive form of analogy which is supplementary to interpretation and sheds light only in clarifying some aspects of the *ahkām*'. In the context of contemporary jurisprudence, *qiyās* that holds the promise of enrichment, Turābī adds, is the natural and original *qiyās* (*al-qiyās al-fitrī al-hur*) which is free of the difficult conditions that were appended to it, initially by the Greeks and subsequently by Muslim jurists, in order to ensure stability in the development of the *Sharī'ah*.¹⁰⁰ Abū Sulaymān has observed that *qiyās* in areas of social interaction should be broad and comprehensive. 'A long loss of time and a radical change of place may leave little practical room for the method of partial and case to case *qiyās*.' We need to depart from

the pedanticism of conventional *qiyās* to one which is 'systematic, conceptual, abstract and comprehensive'.¹⁰¹

The *mujtahid* and judge would naturally need to exercise caution in the construction and application of *qiyās*. The jurist normally ascertains the *ratio legis* of an existing law which is then extended by analogy to a new problem. The process involved here resembles that of the common law doctrine *stare decisis*. The judge distinguishes the *ratio decidendi* of an existing judicial decision in reference to a new case and, once it is established that the two cases have the same ratio in common, the ruling of the earlier decision is analogically extended to the new case. The idea of *ratio legis* in the civil law system, and of *ratio decidendi* in common law, is substantially the same as that of the '*illah*' (and its broader equivalent, the *hikmah*) in Islamic jurisprudence.¹⁰² With regard to the identification of '*illah*' in *qiyās* the precedent of the Companions and the leading imams is unequivocal on the point that the norm in regard to *ta'līl* (ratiocination) is *maṣlahah*, from which *ta'līl* derives its basic argument. It was only at a later stage that the jurists of the Hanafi and Shāfi'i schools departed from the *maṣlahah*-based *ta'līl*, known as *hikmah*, toward the more technical concept of '*illah*'. But, even so, the '*illah*' was still largely based on *maṣlahah*, albeit that '*illah*' stipulated certain conditions, namely that the *maṣlahah* in question should be constant (*munḍabit*) so that it did not change with changes of circumstance. The '*illah*' was also to rely on *maṣlahah* that was evident (*ẓāhir*) and not a hidden factor that could not be ascertained by the senses. Al-Ghazālī thus noted that it is the *maṣlahah* that determines the *hukm* but, since it could be hidden factor, '*illah*' was proposed as a substitute, for the latter only relied on the manifest attributes of that *maṣlahah*.¹⁰³ Al-Shātibī attempted to equate the two concepts of '*illah*' and *hikmah* by saying that '*illah*' consisted of nothing other than the rationale and benefit (*al-hikmah wa'l-maṣāliḥ*) that lay at the root of the laws (*ahkām*) of *Sharī'ah*. Hence 'the '*illah*' is identical with the *maṣlahah* and it does not merely represent a manifest attribute of *maṣlahah*: we therefore disregard the notion of the '*illah*' being constant and evident'.¹⁰⁴

It is indeed the *hikmah* itself in which the '*illah*' is rooted, such as lapse of intellect, which is the *hikmah* in the prohibition of wine-drinking, and this is reflected in intoxication, the latter being the '*illah*' of the same prohibition. The Mālikīs and Ḥanbalīs who validated *hikmah* as the basis of *qiyās* did not require the *hikmah* to be constant and evident, provided that it consisted of a proper attribute (*waṣf munāsib*) and was in harmony with the objectives of the Lawgiver.

Hikmah is thus a more open concept than *'illah* and is a direct embodiment of the rationale and objective of a particular *hukm* on which an analogy may validly be founded.

The fact remains, however, that the jurists of the post-classical period (*muta'akhkhirīn*) went far in the direction of adding to the technicalities of *'illah* in *qiyās*. The result of this was that *qiyās* itself lost its grounding in *maṣlahah*, and its original vision and purpose grasping the *maṣlahah* of the people became subject to the exercise of specious reasoning.¹⁰⁵ We note yet another irregularity in the application of *qiyās* in that the jurists of the post-classical period showed a tendency to declare many things, including transactions that served popular needs, prohibited on grounds merely of doubtful *qiyās*. This somewhat facile application of *qiyās* stood in contrast with the Qur'ānic principle of *raf' al-haraj* (removal of hardship) and its declaration that 'what is forbidden to you has been clearly explained' (al-An'ām, 6:119)

وقد فصل لكم ما حرم عليكم

and also the legal maxim which declares that 'permissibility is the normal state of things'. A careful observance of these guidelines surely suggests that liberal use of *qiyās* in regard to prohibition is not advisable.¹⁰⁶

We note that in all this, it is the judge/jurist whose attitude and vision in the application of *qiyās* is the more important determinant of the contribution judgements can make to the enrichment of *Sharī'ah*. Parviz Owsia has ascertained the utility of *qiyās* in judicial decision-making and compared it to some of its parallel concepts in modern law. It is thus noted that the search in the civil law system for *ratio legis*, and under common law system for *ratio decidendi*, or under an Islamic system for the underlying rationale (*hikmah* or *manāṭ*) of a rule, may all discharge similar functions, depending, of course, on the basic approach one is inclined to take. They cause, under a restrictive vision, the rigidity of the law, but conversely they serve, with a visionary outlook, the flexibility and adaptability of the law.¹⁰⁷ The skill and insight of the judge in determining the ratio of a case is once again highlighted by another observer who stated that the ratio of a case is neither found in the reason given in the judge's opinion nor in the rule of law set forth in that opinion, nor even by a consideration of all ascertainable facts. Rather, the ratio is to be found by reference to the facts that the judge has treated as material and the decision that is based on those facts.¹⁰⁸

The following three stages of enquiry are involved in the construction of an analogy: (1) perception of relevant likeness between the factual issues as defined by the court in a previous case; (2) determination of the *ratio decidendi* of the previous case; (3) the decision to apply the ruling of the previous case to the present case. It is then suggested that the first of these three steps is essentially psychological, and therefore not entirely governed by the elements in the legal system.¹⁰⁹ Wisdom and application of 'good sense', rather than a mechanical or fixed set of logical rules, is recommended in the determination of *ratio decidendi*. It thus appears that the fears of rigidity and the concern over strict adherence to precedent is ever-present in constructing an analogy in both Islamic law and Western jurisprudence. The concern here was vividly voiced by Lord Gardener who declared in 1966, while representing the Lords of Appeal in ordinary, that 'their Lordships regard the use of precedent as an indispensable foundation...they recognise nevertheless that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law'.¹¹⁰

The broad purpose of this message is applicable to *qiyās*, which is the nearest equivalent in Islamic law to the common law doctrine of judicial precedent. It is ironic to note, however, that Islamic law does not recognise judicial precedent as a binding proof precisely because of its restrictive effect on *ijtihād*. The integrity of *ijtihād* was deemed to be liable to compromise if judicial precedent were to carry a binding force on the lower courts. The ruling of one judge or *mujtahid* essentially carries the same authority as that of another. But the rigidity that the Muslim jurist tried to avoid in this instance was visited upon him through the imposition of burdensome technicalities on *qiyās*. The correct advice in both instances is surely to avoid rigid conformity to precedent at the expense of losing sight of the broad purpose and objective of the law.

NOTES

1. Amidi, *Ibāḥ*, III, 183.
2. Ghazālī, *Mustaṣfā*, II, 54.
3. Shawkāni, *Iḥḥād*, p. 198.
4. Cf. Abdur Rahim, *Jurisprudence*, p. 137.
5. Khallaf, *Ilm*, p. 52.
6. Ibn Qayyim, *Fāḥ*, II, 242; Abdur Rahim, *Jurisprudence*, p. 138.

7. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 536, *hadith* no. 2075; Tabrizi, *Mishkāt*, II, 940, *hadith* no. 3144; Mūsā, *Alhkām*, p. 45.
8. For these and other examples see al-Zarqā, *al-Madkhal*, I, pp. 71ff.
9. Amidi, *Ihkām*, III, 186.
10. Aghnides, *Muhammadian Theories*, p. 49.
11. Amidi (*Ihkām*, III, 193) is however of the view that the result of *qiyās*, that is the ruling which is to be applied to the new case (i.e. *hukm al-far'*), should not be included in the essential requirements (*arkān*) of *qiyās*. For the *hukm* is only arrived at at the end of the process; it should therefore not be a *nukh*. Isnawi has, on the other hand, included the *hukm al-far'* among the essentials of *qiyās*. The disagreement is perhaps mainly theoretical as the *hukm* of the new case is, for all intents and purposes, identical with the *hukm* of the original case. Zuhayr, *Uṣūl*, IV, 58–59.
12. Shawkīnī, *Inshād*, pp. 204–205; Abū Zahrah, *Uṣūl*, p. 180.
13. Abū Zahrah, *Uṣūl*, p. 181.
14. Khallāf, 'Ilm, p. 53; Shawkīnī, *Inshād*, p. 210.
15. Abū Zahrah, *Uṣūl*, p. 128.
16. Ghazālī, *Mustaṣfā*, II, 87; Shawkīnī, *Inshād*, p. 205.
17. Ibn Rushd, *Bidāyah*, I, 45; Abū Zahrah, *Uṣūl*, p. 183; Nour, 'Qiyās', 29.
18. Ghazālī, *Mustaṣfā*, II, 87.
19. Cf. Abū Zahrah, *Uṣūl*, p. 184.
20. Since al-Zarqā's work is not available to me, my knowledge of his view is confined to the extent that he is quoted by Nour, 'Qiyās', 29.
21. Shawkīnī, *Inshād*, p. 205; Khudārī, *Uṣūl*, p. 295.
22. Amidi, *Ihkām*, III, 196–97.
23. Abū Zahrah, *Uṣūl*, p. 185; Khallāf, 'Ilm, pp. 61–62.
24. Ibn Hazm, *Ihkām*, VIII, 102; Muslim, *Ṣaḥīḥ*, I, 423, *hadith* no. 3600.
25. Ibn Hazm, *Ihkām*, VIII, 103.
26. Shawkīnī, *Inshād*, p. 222; Abū Zahrah, *Uṣūl*, p. 185.
27. The relevant *hadith* reads: 'If Khuzaymah testifies for anyone, that is sufficient as a proof.' Ghazālī, *Mustaṣfā*, II, 88; Abū Dāwūd, *Sunan*, III, 1024, *hadith* no. 3600.
28. Muslim, *Ṣaḥīḥ*, p. 247, *hadith* no. 920; Sha'bān, *Uṣūl*, p. 130.
29. Shawkīnī, *Inshād*, p. 209.
30. Sha'bān, *Uṣūl*, p. 134.
31. Aghnides, *Muhammadian Theories*, p. 62.
32. Bukhārī, *Ṣaḥīḥ* (Istanbul edn.), III, 44 (Kitāb al-salam, *hadith* no. 3); Sarakhsī (*Uṣūl*, p. 152) writes: 'The Prophet forbade the sale of an object which does not exist at the time of the sale but permitted *salām* as an exception. *Salām* is valid on condition that the time of delivery is stipulated and that the parties are able to meet the conditions of their agreement.' See also Abdur Rahim, *Jurisprudence*, p. 145.
33. Shawkīnī, *Inshād*, p. 207; Abū Zahrah, *Uṣūl*, p. 188.
34. Note for example, Shawkīnī (*Inshād*, pp. 207–208) who has listed twenty-four conditions for the 'illah whereas the Mālikī jurist, Ibn Hājib has recorded only eleven.
35. Khallāf, 'Ilm, 64; Abū Zahrah, *Uṣūl*, p. 188.
36. Shawkīnī, *Inshād*, pp. 207–108; Khallāf, 'Ilm, pp. 88–97.
37. Abū Zahrah, *Uṣūl*, p. 188.
38. Ibn Rushd al-Qurṭubī, *Bidāyah*, II, 200; Turābī, *Tajdīd*, p. 24.

39. Khallāf, 'Ilm, p. 64.
40. Shawkīnī, *Inshād*, p. 107; Abdur Rahim, *Jurisprudence*, p. 149; Abū Zahrah, *Uṣūl*, p. 189; Khallāf, 'Ilm, p. 69.
41. Abū Zahrah, *Uṣūl*, p. 189; Khallāf, 'Ilm, p. 69.
42. Muslim, *Ṣaḥīḥ*, p. 375, *hadith* no. 920; Ghazālī, *Mustaṣfā*, II, 98; Khudārī, *Uṣūl*, p. 320; Abū Zahrah, *Uṣūl*, p. 190; Abdur Rahim, *Jurisprudence*, p. 151–52.
43. Abū Zahrah, *Uṣūl*, p. 187, 190, 194; Sha'bān, *Uṣūl*, p. 127.
44. Abū Dāwūd, *Sunan*, III, 1043, *hadith* no. 3672.
45. Muslim, *Ṣaḥīḥ*, p. 375, *hadith* no. 1424; Ghazālī, *Mustaṣfā*, II, 74; Ibn Hazm, *Ihkām*, VIII, 91; Abū Zahrah, *Uṣūl*, p. 193. There are also passages in the Qur'ān on the subject of *ist'ithnā*, or asking permission before entering a private home. Note, for example, *sūra al-Nūr* (24:27) which enjoins: 'O you believers, do not enter homes other than your own unless you act politely and greet their occupants.'
46. Shawkīnī lists a number of other expressions such as *li-sallā min ajli*, *la'allahū kadhā*, *bi-sabab kadhā*, etc., all of which are associated with the idea of explaining the causes (*Inshād*, p. 211).
47. Imām Mālik has by analogy extended the same penalties to a husband who ill-treats his wife. He must first be admonished; if he continues, he must continue paying the wife her maintenance but she is not required to obey him; finally, he may be subjected to physical punishment. See Abū Zahrah, *Uṣūl*, p. 193.
48. Note, for example, *sūra al-Baqara* (2:222) concerning conjugal relations with one's wife during her menstruation, which are to be avoided. The text indicates menstruation to be the 'illah of its ruling. Shawkīnī (*Inshād*, pp. 211–213) provides an exhaustive list of the particles of *ta'ill* with their illustrations from the Qur'ān and the *hadith*.
49. Abū Dāwūd, *Sunan*, III, 1018, *hadith* no. 3582; Ghazālī, *Mustaṣfā*, II, 75; Shawkīnī, *Inshād*, pp. 210–12.
50. Sha'bān, *Uṣūl*, p. 151.
51. Khallāf, 'Ilm, pp. 67–68.
52. Shawkīnī, *Inshād*, p. 210.
53. Nawawī, *Minhāj* (Howard's trans.), p. 284.
54. Ghazālī, *Mustaṣfā*, II, 54; Abū Zahrah, *Uṣūl*, p. 194; Khallāf, 'Ilm, p. 78.
55. Shawkīnī, *Inshād*, pp. 221–22; Abū Zahrah, *Uṣūl*, p. 194.
56. Shawkīnī, *Inshād*, pp. 221–22; Abū Zahrah, *Uṣūl*, p. 194.
57. Ghazālī, *Mustaṣfā*, II, 55; Khallāf, 'Ilm, p. 77.
58. Abū Zahrah, *Uṣūl*, p. 195; Khallāf, 'Ilm, p. 77.
59. Cf. Zaydīn, *al-Wāḥid*, p. 216ff.
60. Abū Zahrah, *Uṣūl*, p. 195.
61. Muslim, *Ṣaḥīḥ*, p. 41, *hadith* no. 119; Ibn Hazm, *Ihkām*, VII, 54–55; Abū Zahrah, *Uṣūl*, p. 195–96; Zuhayr, *Uṣūl*, IV, 44.
62. Zuhayr, *Uṣūl*, IV, 44.
63. Zuhayr, *Uṣūl*, IV, 44–45; Nour, 'Qiyās' 24–45.
64. Shawkīnī, *Inshād*, p. 222; Ibn Qayyim, *I'lām*, I, 178; Zuhayr, *Uṣūl*, IV, 45.
65. Ibid.
66. Ibn Qayyim, *I'lām*, I, 197; Abū Zahrah, *Uṣūl*, p. 175; Khallāf, 'Ilm, p. 54.
67. Ghazālī, *Mustaṣfā*, II, 64; Shāṭibī, *Muwāḥḥaḍ*, III, 217; Ibn Qayyim, *I'lām*, I, 198.

68. Abū Zahrah, *Uṣūl*, p. 176.
69. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 109, *hadith* 1038; Khallāf, *ʿIlm*, p. 56.
70. Ghazālī, *Mustaḥṣi*, 64; Shawkānī, *Inshād*, p. 212; Ibn Qayyim, *Fāim*, I, 200.
71. Ibn Hazm, *Ihkām*, VII, 100; Ibn Qayyim, *Fāim*, I, 200.
72. Ibn Hazm, *Ihkām*, VII, 147; Abū Zahrah, *Uṣūl*, p. 177.
73. Ibn Hazm, *Ihkām*, VII, 160; Ibn Qayyim, *Fāim*, I, 182.
74. Shawkānī, *Inshād*, p. 223; Abū Zahrah, *Uṣūl*, p. 177.
75. Two of the Qur'anic *āyāt* that validate *ibāḥah* are as follows: 'It is He who has created for you all things that are on earth' (al-Baqarah, 2:29); and 'O you believers! Make not unlawful the good things which God has made lawful to you' (al-Mā'idah, 5:90).
76. Ibn Hazm, *Ihkām*, VIII, 3.
77. Ibid., VIII, 18.
78. Ibid., VIII, 9.
79. Ibid.
80. Ibid., VIII, 15.
81. Abū Zahrah, *Uṣūl*, pp. 179–80.
82. Khallāf, *ʿIlm*, p. 79.
83. Muṭahhari, *Jurisprudence*, p. 21.
- 84.
85. Zuhayr, *Uṣūl*, IV, 51; Abū Zahrah, *Uṣūl*, p. 205.
86. The following *hadith* is recorded in Abū Dāwūd (*Sunan*, III, 1229, *hadith* no. 4395): 'The hand of one who rifles the grave should be amputated, as he has entered the house of the deceased.'
87. Shawkānī, *Inshād*, p. 222.
88. Tabrizi, *Mishkāt*, II, 1061, *hadith* no. 3570; Abū Yūsuf, *Kitāb al-Kharāj*, p. 152; Ibn Qayyim, *Fāim*, I, 209.
89. Abū Zahrah, *Uṣūl*, p. 205.
90. Zuhayr, *Uṣūl*, IV, 51.
91. Abū Zahrah, *Uṣūl*, p. 206.
92. Ibid., p. 200.
93. Ibid., pp. 201–202.
94. Ibid., p. 203.
95. Bukhārī, *Sahih* (Istanbul edn.), I, 51 (*Kitāb al-wuḍūʿ*, *hadith* no. 34); Khin, *Athar*, p. 403.
96. Baṣrī, *Mu'tamad*, II, 162–164.
97. Abū Zahrah, *Uṣūl*, p. 204.
98. Ibn Hazm, *Ihkām*, VIII, 79; Abū Zahrah, *Uṣūl*, p. 205.
99. Abū Dāwūd, *Sunan* (Hasan's trans.), II, 955, *hadith* 3355; Ibn Hazm, *Ihkām*, VIII, 106; Zuhayr, *Uṣūl*, IV, 50–58; Abū Zahrah, *Uṣūl*, p. 205.
100. Turābī, *Tajdīd*, p. 24.
101. Abu Sulayman, *Methodology*, p. 84.
102. Cf. Abū Zahrah, *Uṣūl*, p. 184.
103. Ghazālī, *Mustaḥṣi*, II, 310.
104. Shāṭibi, *Minhaj*, I, 265.
105. Shalabi, *Fiqh al-Islāmī*, pp. 166–168.

106. Ibid., p. 165.
107. Owsia, 'Sources of Law', p. 61.
108. Judge Goodhart, 'Determining the Ratio Decidendi', 40 Yale Law Journal 161 (1930).
109. Makdisi, 'Formal Rationality', p. 104.
110. Quoted in Zander, *The Law Making Process*, p. 104.

CHAPTER TEN

Revealed Laws Preceding the *Shari'ah* of Islam

In principle, all divinely revealed laws emanate from one and the same source, namely, Almighty God and, as such, they convey a basic message that is common to them all. The essence of belief in the oneness of God and the need for divine authority and guidance to regulate human conduct and the values of morality and justice constitute the common purpose and substance of all divine religions. This essential unity is confirmed in more than one place in the Qur'an, which proclaims in an address to the Holy Prophet: 'He has established for you the same religion as that which He enjoined upon Noah, and We revealed to you that which We enjoined on Abraham, Moses and Jesus, namely, that you should remain steadfast in religion and be not divided therein' (al-Shūrā, 42:13).

شرع لكم من الدين ما وصى به نوحا والذي أوحينا إليك
وما وصينا به إبراهيم وموسى وعيسى أن أقيموا الدين
ولا تتفرقوا فيه

More specifically, in a reference to the Torah, the Qur'an confirms its authority as a source of inspiration and guidance: 'We revealed the Torah in which there is guidance [*hudā*] and light; and prophets who submitted to God's will have judged the Jews by the standards thereof' (al-Mā'idah, 5:44).

إنا أنزلنا التوراة فيها هدى ونور يحكم بها النبيون

It is thus observed that Muhammad, being one of the prophets, is bound by the guidance that is found in the Torah. Further confirmation of the basic harmony of the divinely revealed laws can be found in the Qur'anic *āyah* which, in a reference to the previous prophets, directs the Prophet of Islam to follow their guidance: 'Those are the ones to whom God has given guidance, so follow their guidance (al-An'ām 6:90).

أولئك الذين هدى الله فيهداهم اقتدوا

Basing themselves on these and similar proclamations in the Qur'an, the *'ulamā'* are unanimous that all the revealed religions are different manifestations of an essential unity.¹ This is, of course, not to say that there are no differences between them. Since each one of the revealed religions was addressed to different nations at different points of time, they each have distinctive features that set them apart from the rest. In the area of *halāl* and *harām*, for example, the rules that are laid down by different religions are not identical. Similarly, in the sphere of devotional practices and the rituals of worship, they differ from one another even if the essence of worship is the same. The *Shari'ah* of Islam has retained many of the previous laws, while it has in the meantime abrogated or suspended others. For example, the law of retaliation (*qisās*) and some of the *hadd* penalties that were prescribed in the Torah have also been prescribed in the Qur'an.²

The general rule to be stated here is however that, notwithstanding their validity in principle, laws that were revealed before the advent of Islam are not applicable to the Muslims. This is especially so with regard to the practical rules of *Shari'ah*, that is, the *ahkām*, in which the *Shari'ah* of Islam is self-contained. The jurists are also in agreement to the effect that the laws of the previous religions are not to be sought in any source other than that of the *Shari'ah* of Islam itself. For the rules of other religions do not constitute a binding proof as far as the Muslims are concerned. The *Shari'ah*, in other words, is the exclusive source of all law for the Muslims.

In view of the ambivalent character of the evidence on this subject, however, the question arises as to the nature of the principle that is to be upheld: whether to regard the laws preceding the *Shari'ah* of Islam as valid unless they are specifically abrogated by the *Shari'ah*, or whether

to regard them as basically nullified unless they are specifically upheld. In response to this, it is said that laws that were introduced in the previous scriptures but which are not upheld by the *Sharī'ah*, and no ruling is found on them in the Qur'ān or the *Sunnah*, are not, according to general agreement, applicable to the Muslims. The correct rule regarding the enforcement of the laws of the previous revelations is that they are not to be applied to the followers of Islam unless they are specifically upheld by the *Sharī'ah*.³

Once again, the question arises as to whether the foregoing statement is in harmony with the Qur'ānic proclamations that were quoted above. The general response given to this is that the Prophet of Islam was ordered to follow the previous revelations as a source of guidance only in regard to the essence of the faith, that is, belief in God and monotheism. It has thus been pointed out that the word *hudā* (guidance) in the second *āyah*, and *hudāhum* (their guidance) in the third *āyah* quoted above only mean *tauhīd*, or belief in the oneness of God, which is undoubtedly the norm in the *Sharī'ah* of Islam. Their guidance cannot be upheld in the face of clear evidence that some of their laws have been abrogated. The reference is therefore to that aspect of guidance that is common to both Islam and the previous religions, namely *tauhīd*. It has been further suggested that the reference to 'prophets' in the second *āyah* above is confined, as the text itself suggests, to the prophets of Banū Isrā'īl, and the Prophet Muḥammad is not one of them.⁴

The Qur'ān on many occasions refers to the rules of previous revelations on specific issues, but the manner in which these references occur is not uniform. The Qur'ān alludes to such laws in the following three forms:

(1) The Qur'ān (or the *Sunnah*) may refer to a ruling of the previous revelation and simultaneously make it obligatory on the Muslims, in which case there remains no doubt that the ruling so upheld becomes an integral part of the *Sharī'ah* of Islam. An example of this is the Qur'ānic text on the duty of fasting which provides: 'O believers, fasting is prescribed for you as it was prescribed for those who came before you' (al-Baqarah, 2:183).

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الصِّيَامُ كَمَا كُتِبَ
عَلَى الَّذِينَ مِن قَبْلِكُمْ

To give a similar example in the *Sunnah*, which confirms the ruling

of a previous religion, we may refer to the *ḥadīth* that makes sacrifice by slaughtering animals lawful for Muslims. The believers are thus instructed to 'give sacrifice, for it is the tradition of your ancestor, Abraham, peace be upon him'.⁵

ضَحُّوا فَإِنَّهُ سَنَةُ إِبْرَاهِيمَ عَلَيْهِ السَّلَامُ.

(2) The Qur'ān or the *Sunnah* may refer to a ruling of the previous revelation but at the same time abrogate and suspend it, in which case the ruling in question is to be abandoned and discontinued. An example of this can be found in the Qur'ān where a reference is made to the prohibition of certain varieties of food to the Jews, while at the same time the prohibitions are lifted from the Muslims. The text thus provides: 'And to the Jews We forbade every animal having claws and of oxen and sheep. We forbade the fat' (al-An'ām, 6:146).

وَعَلَى الَّذِينَ هَادُوا حَرَمْنَا كُلَّ ذِي ظِفْرٍ وَمِنَ الْبَقَرِ
وَالْغَنَمِ حَرَمْنَا عَلَيْهِمُ شَحُومَهُمَا

The second portion of this text clearly removes the prohibitions that were imposed on the Jews. For a similar example in the *Sunnah*, we may refer to the *ḥadīth* concerning the legality of spoils of war where the Prophet has proclaimed: 'Taking booty has been made lawful to me, but it was not lawful to anyone before me'.⁶

أَحَلَّتْ لِيَ الْغَنَائِمَ وَلَمْ تَحَلَّ لِأَحَدٍ مِن قَبْلِي.

Likewise, the expiation (*kaffārah*) for sins was not acceptable under the Torah; and when a garment became unclean, the unclean portion had to be cut out according to the rules of Judaism. But these restrictions were lifted so that the *Sharī'ah* of Islam validated expiation for sins, and clothes can be cleaned by merely washing them with clean water.⁷

(3) The Qur'ān or the *Sunnah* may refer to a ruling of a previous revelation without clarifying the position as to whether it should be abandoned or upheld. Unlike the first two eventualities, on which there is little disagreement among jurists, the present situation has given rise to wider differences of opinion. To give an example, we read in the Qur'ān, in a reference to the law of retaliation that was

enacted in the Torah: 'We ordained therein for them life for life, eye for eye, nose for nose, tooth for tooth and wounds equal for equal' (al-Mā'idah, 5:48).

وكتبنا عليهم فيها أن النفس بالنفس والعين بالعين والأنف
بالأنف والأذن بالأذن والسن بالسن والجروح قصاص

Here there is no clarification as to whether the same law has to be observed by the Muslims. In yet another passage in the same sūrah the Qur'ān stresses the enormity of murder in the following terms: 'We ordained for the children of Israel that anyone who slew a person, unless it be for murder or mischief in the land, it would be as if he slew the whole of mankind' (al-Mā'idah, 5:32).

وكتبنا على بني إسرائيل أنه من قتل نفسا بغير نفس أو فساد
في الأرض فكأنما قتل الناس جميعا

Once again, this āyah narrates a law of a previous revelation but does not specify whether this also constitutes a part of the *Sharī'ah* of Islam. The majority of Hanafi, Māliki and Hanbali jurists as well as some Shāfi'i ones have held the view that the foregoing is a part of the *Sharī'ah* of Islam, and the mere fact that the Qur'ān refers to it is sufficient to make the law of retaliation binding on the Muslims. For the Lawgiver spoke of the law of the Torah to the Muslims and there is nothing in the *Sharī'ah* of Islam either to abrogate it or to warrant a departure from it. This is the law of God, which He narrated to us for purposes of adherence. It is on the basis of this conclusion that the Hanafis have validated the execution of a Muslim for murdering a non-Muslim (i.e. a *dhimmi*), and a man for murdering a woman, as they all fall within the meaning of the Qur'ānic phrase 'life for life'.⁸ There are some variant opinions on this, but even those who disagree with the Hanafi approach to this issue subscribe to the same principle that they find enunciated elsewhere in the Qur'ān. In particular, two āyāt have been quoted, which proclaim, 'And the punishment of an evil is an evil like it' (al-Shūrā, 42:40);

وجزاء سيئة سيئة مثلها

and 'Whoever acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and keep your duty to God (al-Baqarah, 2:194).

فمن اعتدى عليكم فاعتدوا عليه بمثل ما اعتدى
عليكم واتقوا الله

It is thus concluded that these āyāt provide sufficient evidence in support of the law of retaliation even without any reference to previous revelations.

The majority of the Shāfi'is, the Ash'arites and the Mu'tazilites have maintained the view that since Islam abrogated the previous laws, they are no longer applicable to the Muslims; and hence these laws do not constitute a part of the *Sharī'ah* of Islam unless they are specifically validated and confirmed. They maintain that the *Sharī'ah* norm regarding the laws of the previous religions is 'particularity' (*khushūṣ*), which means that they are followed only when specifically upheld; whereas the norm with regard to the *Sharī'ah* itself is generality (*'umūm*) in that it is generally applied as it has abrogated all the previous scriptures.⁹ This restriction is necessitated in view of the fact that the previous religions have not been correctly transmitted to us and have undergone considerable distortion.¹⁰ The proponents of this view have quoted in support the Qur'ānic text which declares, in a reference to different nations and communities: 'For every one of you We have ordained a divine law and an open road' (al-Mā'idah, 5:48).

لكل جعلنا منكم شرعة ومنهاجا

Thus it is suggested that every nation has a *Sharī'ah* of its own, and therefore the laws that were revealed before Islam are not binding on this *ummah*. Further evidence for this view has been sought in the *ḥadīth* of Mu'adh ibn Jabal which indicates only three sources for the *Sharī'ah*, namely the Qur'ān, the *Sunnah* and *ijtihād*.¹¹ The fact that this *ḥadīth* has made no reference to previous revelations must mean that they are not a source of law for the followers of Islam. This last point has, however, been disputed in that when Mu'adh referred to the Qur'ān, it was sufficient, as the Qur'ān itself contains numerous references to other revealed scriptures. Furthermore it is well-known that the Prophet did not resort to the Torah and Injil in order to find the rulings of particular issues, especially at times when he postponed

matters in anticipation of divine revelation. This would obviously imply that the Prophet did not regard the previous laws as binding on his own community.¹²

The correct view is that of the majority, which maintains that the *Sharī'ah* of Islam only abrogates rules that are disagreeable to its teachings. The Qur'ān, on the whole, confirms the Torah and the Injil and, whenever a ruling of the previous scriptures is quoted without abrogation, it becomes an integral part of the *Sharī'ah* of Islam.¹³ Finally, it may be added, as Abū Zahrah has pointed out, that disagreement among jurists on the authority or otherwise of the previous revelations is of little practical consequence, as the *Sharī'ah* of Islam is generally self-contained and its laws are clearly identified. With regard to retaliation, for example, notwithstanding the differences of opinion among the jurists as to the precise import of the Qur'ānic references to this subject, the issue is resolved, once and for all, by the *Sunnah* which contains clear instructions on retaliation and leaves no doubt that it is an integral part of the *Sharī'ah* of Islam.¹⁴

NOTES

1. Abū Zahrah, *Uṣūl*, p. 241; Qāsimi, *Uṣūl*, p. 173.
2. Abū Zahrah, *Uṣūl*, p. 242; Badrān, *Uṣūl*, p. 237.
3. Badrān, *Uṣūl*, p. 234; Ismā'īl, *Adillah*, p. 320.
4. Ghazālī, *Mustafā*, I, 134; Abū Zahrah, *Uṣūl*, p. 242; Ismā'īl, *Adillah*, p. 325.
5. Tabrizi, *Mashkāt*, I, 466, *ḥadīth* no. 1476; Badrān, *Uṣūl*, p. 235.
6. Muslim, *Ṣaḥīḥ*, p. 301, *ḥadīth* no. 1137; Badrān, *Uṣūl*, p. 234.
7. Khallāf, *Ilm*, p. 93; Ismā'īl, *Adillah*, p. 31.
8. Khallāf, *Ilm*, p. 94; Shaltūt, *al-Islām*, p. 489; Badrān, *Uṣūl*, p. 235.
9. Shawkāni, *Inḥād*, p. 240; Shaltūt, *al-Islām*, p. 489; Badrān, *Uṣūl*, p. 236.
10. Abdur Rahim, *Jurisprudence*, p. 70.
11. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 1019, *ḥadīth* no. 3585.
12. Ghazālī, *Mustafā*, I, 133. The only exception that is cited in this connection is when the Prophet referred to the Torah on the stoning of Jews for adultery. But this was only to show, as Ghazālī explains, that stoning (*najm*) was not against their religion, and not because the Prophet regarded the Torah as a source of law.
13. Khallāf, *Ilm*, p. 94.
14. Abū Zahrah, *Uṣūl*, p. 242.

CHAPTER ELEVEN

The *Fatwā* of a Companion

The Sunni '*ulamā'* are in agreement that the consensus (*ijmā'*) of the Companions of the Prophet is a binding proof, and represents the most authoritative form of *ijmā'*. The question arises, however, as to whether the saying or *fatwā* of a single Companion should also be recognised as a proof and given precedence over evidences such as *qiyās*, or the *fatwās* of other *mujtahids*. A number of leading jurists from various schools have answered this question in the affirmative, and have held the view that the *fatwā* of a Companion is a proof (*ḥujjah*) that must be followed. Their argument is that following the demise of the Prophet, the leadership of the Muslim community fell upon their shoulders, and a number of learned Companions, with their intimate knowledge of the Qur'ān and the teachings of the Prophet, were able to formulate *fatwās* and issue decisions on a wide range of issues. The direct access to the Prophet that the Companions enjoyed during his lifetime, and their knowledge of the problems and circumstances surrounding the revelation of the Qur'ān, known as the *ashāb al-nuzūl*, put them in a unique position to formulate *ijtihād* and to issue *fatwās* on the problems they encountered. Some '*ulamā'* and transmitters of *ḥadīth* have even equated the *fatwā* of a Companion with the *Sunnah* of the Prophet. The most learned Companions, especially the four Rightly-Guided Caliphs, are particularly noted for their contributions and the impact they made in the determination of the detailed rules of *fiqh* regarding the issues that confronted them.¹ This is perhaps attested by the fact that the views of the Companions were occasionally upheld and confirmed by the Qur'ān. Reference may be made in this context to the Qur'ānic *āyah* that was revealed concerning the

treatment that was to be accorded to the prisoners of war following the battle of Badr. This *āyah* (al-Anfāl, 8:67) is known to have confirmed the view that 'Umar ibn al-Khaṭṭāb had earlier expressed on the issue.² The question arises, nevertheless, as to whether the *fatwā* of a Companion should be regarded as a proof of *Sharī'ah* or a mere *ijtihād* that may or may not be accepted by the subsequent generations of *mujtahidūn* and the rest of the community as a whole. No uniform response has been given to this question but, before we attempt to explore the different responses that the 'ulamā' have given, it will be useful to identify who exactly a Companion is.

According to the majority (*jumhūr*) of 'ulamā', anyone who met the Prophet while believing in him, even for a moment, and died as a believer, is a Companion (*ṣaḥābī*) regardless of whether he or she narrated any *ḥadīth* from the Prophet or not. Others have held that the very word *ṣaḥābī*, which derives from *ṣuḥbah*, that is 'companionship', implies continuity of contact with the Prophet and narration of *ḥadīth* from him. It is thus maintained that one or the other of these criteria, namely prolonged company, or frequent narration of *ḥadīth*, must be fulfilled in order to qualify a person as a *ṣaḥābī*.³ Some observers have made a reference to custom (*urf*) in determining the duration of contact with the Prophet which may qualify a Companion. This criterion would, in turn, overrule some of the variant views to the effect that a *ṣaḥābī* is a person who has kept the company of the Prophet for specified periods such as one or two years, or that he participated with the Prophet in at least one of the battles.⁴ But notwithstanding the literal implications of the word 'ṣaḥābī', the majority view is to be preferred, namely that continuity or duration of contact with the Prophet is not a requirement. Some 'ulamā' have held that the encounter with the Prophet must have occurred at a time when the person had attained the age of majority, but this too is a weak opinion as it would exclude many who met the Prophet and narrated *ḥadīth* from him and attained the age of majority only after his death. Similarly, actual eye-witnessing is not required, as there were persons among the Companions, like Ibn Umm Maktūm, who were blind but were still regarded as *ṣaḥābī*.

The fact of being a Companion may be established by means of continuous testimony, or *tauwātūr*, which is the case with regard to the most prominent Companions such as the *khulafā' rashidūn* and many others. The status of *ṣaḥābī* may even be established by a reputation that falls short of amounting to *tauwātūr*. Similarly, it may be established by the affirmation of another well-known Companion. According

to some 'ulamā', including al-Bāqillānī, we may also accept the Companions own affirmation in evidence, as they are all deemed to be upright (*udūl*), and this precludes the attribution of lying to them. There is, however, a difference of opinion on this point. The preferred view is that reference should be made to corroborating evidence, which may affirm or refute a person's claim concerning himself. This precaution is taken with a view to preventing false allegations and the admittance of self-styled individuals into the ranks of the Companions.⁵

The saying of a Companion, referred to both as *qawl al-ṣaḥābī* and *fatwā al-ṣaḥābī*, normally means an opinion that the Companion had arrived at by way of *ijtihād*. It may be a saying, a considered opinion (*fatwā*) or a judicial decision that the Companion had taken on a matter in the absence of a ruling in the Qur'ān, *Sunnah* and *ijmā'*. For in the face of a ruling in these sources, the *fatwā* of a Companion would not be the first authority on that matter. If the *fatwā* is related to the Qur'ān and *Sunnah*, then it must be on a point that is not self-evident in the source. There would, in other words, be a gap in our understanding of the matter at issue had the Companion not expressed an opinion on it.⁶

As stated earlier, there is no disagreement among the jurists on the fact that the saying of a Companion is a proof that commands obedience when it is not opposed by other Companions. Rulings on which the Companions were known to be in agreement are binding. An example of this is the grandmother's share of one-sixth in inheritance on which the Companions have agreed, and it represents their authoritative *ijmā'*. The 'ulamā' are, however, in disagreement with regard to rulings that are based on opinion (*ra'y*) and *ijtihād*, and in regard to matters on which the Companions differed among themselves.⁷

There is general agreement among the 'ulamā' of *uṣūl* on the point that the ruling of one Companion is not a binding proof over another, regardless of whether the ruling in question was issued by one of the caliphs, a judge or a leading *mujtahid* among their number, for the Companions were allowed to disagree with one another in matters of *ijtihād*. Had the ruling of one Companion been a proof over another, disagreement among them would not have been tolerated. But as already noted, the 'ulamā' of *uṣūl* have differed as to whether the ruling of a Companion constitutes a proof as regards the successors (*ṭabī'ūn*) and the succeeding generations of *mujtahids*.⁸ There are three views on this, which may be summarised as follows:

(1) That the *fatwā* of a Companion is a proof absolutely, and takes

priority over *qiyās* regardless of whether it is in agreement with the *qiyās* in question or otherwise. This is the view of Imam Mālik, one of the two views of Imam Shāfi'i, one of the two views of Imam Ahmad ibn Hanbal and of some Hanafi jurists. The proponents of this view have referred to the Qur'anic text which provides in a reference to the Companions: 'The first and foremost among the Emigrants and Helpers and those who followed them in good deeds, God is well-pleased with them, as they are with Him' (al-Tawbah, 9:100).

والسابقون الأولون من المهاجرين والأنصار والذين اتبعوهم
بإحسان رضي الله عنهم ورضوا عنه

In this text, God has praised 'those who followed the Companions'. It is suggested that this manner of praise for those who followed the opinion and judgment of the Companions warrants the conclusion that everyone should do the same. The *fatwā* of a *ṣaḥābī*, in other words, is a proof of *Sharī'ah*. Another Qur'anic *āyah* that is quoted by the proponents of this view also occurs in the form of a commendation, as it reads in an address to the Companions: 'You are the best community that has been raised for mankind; you enjoin right and you forbid evil' (Āl 'Imrān, 3:110).

كنتم خير أمة أخرجت للناس تأمرون بالمعروف
وتنهون عن المنكر

Their active and rigorous involvement in the propagation of Islam under the leadership of the Prophet is the main feature of the *amr bi'l-ma'rūf* (enjoining right) that the Companions pursued. The Qur'an praises them as 'the best community' and as such their example commands authority and respect.⁹ It has, however, been suggested that the Qur'anic references to the Companions are all in the plural, which implies that their individual views do not necessarily constitute a proof. But in response to this, it is argued that the Qur'an establishes their uprightness (*ādālah*) as individuals, and those who follow them in good deeds have been praised because they followed their opinion and judgement both as individuals and groups. It is further pointed out that those who followed the Companions are praised because they followed the personal opinion of the Companions, and

not because the latter themselves followed the Qur'an and *Sunnah*. If this were to be the case, then the Qur'anic praise would be of no special significance as it would apply to everyone who followed the Qur'an and *Sunnah*, whether a Companion or otherwise. If there is any point, in other words, in praising those who followed the Companions, then it must be because they followed the personal views of the Companions. It is thus concluded that following the *fatwā* of the Companions is obligatory, otherwise the Qur'an would not praise those who followed it in such terms.¹⁰ The proponents of this view have also referred to several *ḥādīth*, one of which provides: 'My Companions are like stars; whoever you follow will lead you to the right path.'

أصحابي كالنجوم بأيهم اقتديتم اهتديتم.

Another *ḥādīth* that is also quoted frequently in this context reads: 'Honour my Companions, for they are the best among you, and then those who follow them and then the next generation, and then lying will proliferate after that.'¹¹

أكرموا أصحابي فإنهم خياركم ، ثم الذين يلونهم ،
ثم الذين يلونهم ، ثم يظهر الكذب.

It is thus argued that according to these *ḥādīth*, following the way of the Companions is equated with correct guidance, which implies that their sayings, teachings and *fatwās* constitute a proof that commands adherence.

It is, however, contended that these *ḥādīth* refer to the dignified status of the Companions in general, and are not categorical to the effect that their decisions must be followed. In addition, since these *ḥādīth* are conveyed in absolute terms in that they identify all the Companions as a source of guidance, it is possible that the Prophet had meant only those who transmitted *ḥādīth* and disseminated Prophetic teachings, in which case the reference would be to the authority of the Prophet himself. The Companions in this sense would be viewed as mere transmitters and propagators of the *Sunnah* of the Prophet.¹²

Furthermore, the foregoing references to the Companions, as al-Ghazālī points out, are in the nature of praise, which indicates their piety and propriety of conduct in the eyes of God, but does not render adherence to their views an obligation. Al-Ghazālī also quotes

a number of other *ḥadīth* in which the Prophet praises individual Companions by name, each of which consists of commendation and praise; they do not necessarily mean that the sayings of those Companions are a binding proof (*ḥujjah*).¹³

(2) The second view is that the *ijtihād* of a Companion is not a proof and does not bind the succeeding generations of *muftahidūn* or anyone else. This view is held by the Ash'arites, the Mu'tazilah, Imam Ahmad ibn Hanbal (according to one of his two views), and the Hanafi jurist Abū al-Hasan al-Karkhi.¹⁴ The proponents of this view have quoted in support the Qur'anic *āyah* (al-Hashr, 59:2) which states: 'Consider, O you who have vision.'

فاعتبروا يا أولي الأبصار

It is argued that this *āyah* makes *ijtihād* the obligation of everyone who is competent to exercise it, and makes no distinction between the *muftahid* who is a Companion or anyone else. What is obligatory is *ijtihād* itself, not adhering to the *ijtihād* of anyone in particular. This *āyah* also indicates that the *muftahid* must rely directly on the sources and not imitate anyone, including the Companions. The proponents of this view also refer to the *ijmā'* of the Companions, referred to above, to the effect that the views of one *muftahid* among them did not bind the rest of the Companions.¹⁵ Al-Ghazālī and al-Āmidī both consider this to be the preferred view, saying that those who have held otherwise have resorted to evidence that is generally weak. Al-Shawkānī has also held that the *fatwā* of a Companion is not a proof, as he explains that the *sunnah* is required to follow the Qur'an and *Sunnah*. The *Shari'ah* only renders the *Sunnah* of the Prophet binding on the believers, and no other individual, whether a Companion or otherwise, has been accorded a status similar to that of the Prophet.¹⁶ Abū Zahrah has, however, criticised al-Shawkānī's conclusion, and explains that when we say that the saying of a Companion is an authoritative proof, it does not mean that we create a rival to the Prophet. On the contrary, the Companions were most diligent in observing the Qur'an and *Sunnah*, and it is because of this and their closeness to the Prophet that their *fatwā* carries greater authority than that of the generality of other *muftahidūn*.¹⁷

(3) The third view, which is attributed to Abū Hanīfah, is that the ruling of the Companion is a proof when it is in conflict with *qiyās* but not when it agrees with *qiyās*. The explanation for this is that when the ruling of a *ṣahābī* conflicts with *qiyās*, it is usually for a reason,

and the fact that the Companion has given a ruling against it is an indication of the weakness of the *qiyās*; hence the view of the Companion is to be preferred. In the event where the ruling of the Companion agrees with *qiyās*, it merely concurs with a proof on which the *qiyās* is founded in the first place. The ruling of the Companion is therefore not a separate authority.¹⁸

There is yet another view which maintains that only the rulings of the four Rightly-Guided Caliphs command authority. This view quotes in support the *ḥadīth* in which the Prophet ordered the believers: 'You are to follow my *Sunnah* and the *Sunnah* of the *khulafā'* *rāshidūn* after me'.

عليكم بسنتي وسنة الخلفاء الراشدين من بعدي .

This is even further narrowed down, according to another *ḥadīth*, to include the first two caliphs only. The *ḥadīth* in question reads: 'Among those who succeed me, follow Abū Bakr and 'Umar'.

اقتدوا بالذي من بعدي ، أبوبكر وعمر .

The authenticity of this second *ḥadīth* has, however, been called into question, and in any case, it is suggested that the purpose of these *ḥadīth* is to merely praise the loyalty and devotion of these luminaries of Islam, and to commend their excellence of conduct.¹⁹

Imam Shāfi'i is on record as having stated that he followed the *fatwā* of a Companion in the absence of a ruling in the Qur'an, *Sunnah* and *ijmā'*. Al-Shāfi'i's view on this point is, however, somewhat ambivalent, which is perhaps why it has been variously interpreted by the jurists. In a conversation with al-Rabī', al-Shāfi'i stated: 'We find that the *'ulamā'* have sometimes followed the *fatwā* of a Companion and have abandoned it at other times; and even those who have followed it are not consistent in doing so.' At this point the interlocutor asks the Imam, 'What should I turn to, then?' To this al-Shāfi'i replies: 'I follow the ruling of the Companion when I find nothing in the Qur'an, *Sunnah* or *ijmā'*, or anything which carries through the implications of these sources.' Al-Shāfi'i has further stated that he prefers the rulings of the first three caliphs over those of the other Companions, but that when the Companions are in disagreement, we should look into their reasons and also try to ascertain the view that might have been adopted by the majority of the Companions. Furthermore, when the ruling of the Companion

is in agreement with *qiyās*, then that *qiyās*, according to al-Shāfi'ī, is given priority over a variant *qiyās* which is not so supported.²⁰

Imam Abū Hanīfah is also on record as having said, 'When I find nothing in the Book of God and the *Sunnah* of the Prophet, I resort to the saying of the Companions. I may follow the ruling which appeals to me and abandon that which does not, but I do not abandon their views altogether and do not give preference to others over them.' It thus appears that Abū Hanīfah would give priority to the ruling of a Companion over *qiyās*, and although he does not consider it a binding proof, it is obvious that he regards the *fatwā* of a *ṣahābī* to be preferable to the *ijtihād* of others.²¹

Imam Ahmad ibn Hanbal has distinguished the *fatwās* of Companions into two types, one being a *fatwā* that is not opposed by any other Companion, or where no variant *ijtihād* has been advanced on the same issue. Ibn Hanbal regards this variety of *fatwā* as authoritative. An example of this is the admissibility of the testimony of slaves, on which the Imam has followed the *fatwā* of the Companion, Anas ibn Mālik. Ibn Hanbal is quoted to the effect that he had not known of anyone who rejected the testimony of a slave; it is therefore admissible. The second variety of *fatwā* that Ibn Hanbal distinguishes is one on which the Companions disagreed, and issued two or three different rulings concerning the same problem. In this situation, Imam Ibn Hanbal considers them all to be valid and equally authoritative, unless it is known that the *khulafā' rāshidūn* adopted one in preference to the others, in which case the Imam would do likewise. An example of such disagreement is the case of the allotment of a share in inheritance to full brothers during the life of the father's father. According to Abū Bakr, the father's father in this case is accounted like the father who would in turn exclude the full brothers altogether. Zayd ibn Thābit, on the other hand, counted the father's father as one of the brothers and would give him a minimum of one-third, whereas 'Alī ibn Abī Ṭalib counted the father's father as one of the brothers whose entitlement must not be less than one-sixth. Imam Ibn Hanbal is reported to have accepted all the three views as equally valid, for they each reflect the light and guidance that their authors received from the Prophet, and they all merit priority over the *ijtihād* of others.²²

The Hanbalī scholar Ibn Qayyim al-Jawziyyah quotes Imam al-Shāfi'ī as having said, 'It is better for us to follow the *ra'y* of a Companion rather than our own opinion.' Ibn al-Qayyim accepts this without reservation, and produces evidence in its support. He

then continues to explain that the *fatwā* of a Companion may fall into one of six categories. Firstly, it may be based on what the Companion might have heard from the Prophet. Ibn al-Qayyim explains that the Companions knew more about the teachings of the Prophet than what has come down to us in the form of *ḥadīth* narrated by the Companions. Note, for example, that Abū Bakr al-Ṣiddīq transmitted no more than one hundred *ḥadīth* from the Prophet, notwithstanding the fact that he was deeply knowledgeable of the *Sunnah* and was closely associated with the Prophet not only after the Prophetic mission began, but even before this time. Secondly, the *fatwā* of a Companion may be based on what he might have heard from a fellow Companion. Thirdly, it may be based on his own understanding of the Qur'ān in such a way that the matter would not be obvious to us had the Companion not issued a *fatwā* on it. Fourthly, the Companion may have based his view on the collective agreement of the Companions, although we have received it through one Companion only. Fifthly, the *fatwā* of a Companion may be based on the learned opinion and general knowledge that he acquired through long-standing association with the Prophet and fellow Companions. And sixthly, the *fatwā* of a Companion may be based on an understanding of his that is not a result of direct observation but of information that he received indirectly, and it is possible that his opinion is incorrect, in which case his *fatwā* is not a proof and need not be followed by others.²³

And lastly, it will be noted that Imam Mālik has not only upheld the *fatwās* of Companions but has almost equated it with the *Sunnah* of the Prophet. This is borne out by the fact, as already stated in our discussion of the *Sunnah*, that in his *Muwatta'*, he has recorded over 1,700 *ḥadīth*, of which over half are the sayings and *fatwās* of Companions.

On a similar note, Abū Zahrah has reached the conclusion that the four imams of jurisprudence have all, in principle, upheld and followed the *fatwās* of Companions and all considered them to be authoritative, although some of their followers have held views which differ with those of their leading Imams. The author then quotes al-Shawkānī at some length to the effect that the *fatwā* of a Companion is not a proof. Having quoted al-Shawkānī, Abū Zahrah refutes his view by saying that it is 'not free of exaggeration'.²⁴ Abū Zahrah then quotes Ibn Qayyim's view on this matter, which we have already discussed, and supports it to the effect that the *fatwā* of a Companion is authoritative. But it is obvious from the tenor of his

discussion and the nature of the subject as a whole that the *fatwā* of a Companion is a speculative proof only.²³ Although the leading imams of jurisprudence are in agreement on the point that the *fatwā* of a Companion is authoritative, none has categorically stated that it is a binding proof. Nonetheless, the four leading Imams consider the *fatwā* of a Companion to be a persuasive source of guidance in that it carries a measure of authority which merits careful consideration, and commands priority over the *ijtihād* of other *mujtahidūn*.

NOTES

1. Khallāf, *Ilm*, p. 94; Mahmāsānī, *Falsafah*, p. 98; Ismā'īl, *Adillah*, p. 281.
2. Ghazālī, *Mustaṣṣā*, I, 136.
3. Shawkātī, *Ishād*, p. 70.
4. Ismā'īl, *Adillah*, p. 282.
5. Shawkātī, *Ishād*, p. 71; Ismā'īl, *Adillah*, p. 283.
6. Cf. Ismā'īl, *Adillah*, pp. 284–85.
7. Khallāf, *Ilm*, p. 95.
8. Āmidī, *Ihkām*, IV, 149; Shawkātī, *Ishād*, p. 243.
9. Ibid., p. 152; Abū Zahrah, *Uṣūl*, p. 168; Zuhayr, *Uṣūl*, IV, 192.
10. Ismā'īl, *Adillah*, pp. 291–2.
11. Tabrizī, *Mishkāt*, III, 1695, *ḥadīth* no. 6001 and 6003; Ghazālī, *Mustaṣṣā*, I, 136; Āmidī, *Ihkām*, IV, 152.
12. Zuhayr, *Uṣūl*, IV, 192; Ismā'īl, *Adillah*, p. 287.
13. Ghazālī, *Mustaṣṣā*, I, 136–7.
14. Ismā'īl, *Adillah*, p. 194; Zuhayr, *Uṣūl*, IV, 193.
15. Ghazālī, *Mustaṣṣā*, I, 135; Āmidī, *Ihkām*, IV, 149.
16. Shawkātī, *Ishād*, p. 214.
17. Abū Zahrah, *Uṣūl*, p. 172; Ismā'īl, *Adillah*, p. 299.
18. Zuhayr, *Uṣūl*, IV, 194; Ismā'īl, *Adillah*, p. 301.
19. Ibn Mājah, *Sunan*, I, 37, *ḥadīth* no. 97; Ghazālī, *Mustaṣṣā*, I, 135; Āmidī, *Ihkām*, IV, 152.
20. Shāfi'ī, *Risālah*, p. 261; Shawkātī, *Ishād*, p. 243; Abū Zahrah, *Uṣūl*, p. 1.
21. Abū Zahrah, *Uṣūl*, p. 170.
22. Abū Zahrah, *Ibn Ḥanbal*, p. 287; Ismā'īl, *Adillah*, pp. 295–6.
23. Ibn Qayyim, *Ilām*, II, 191ff; Abū Zahrah, *Uṣūl*, pp. 170.
24. We have already given a brief outline of Abū Zahrah's critique of al-Shawkātī.
25. Abū Zahrah, *Uṣūl*, p. 171.

CHAPTER TWELVE

Istihsān (Equity in Islamic Law)

The title I have chosen for this chapter draws an obvious parallel between equity and *istihsān* which should be explained, for the two are not identical, although they bear a close similarity to one another. 'Equity' is a Western legal concept that is grounded in the idea of fairness and conscience, and derives legitimacy from a belief in natural rights or justice beyond positive law.¹ *Istihsān* in Islamic law, and equity in Western law, are both inspired by the principle of fairness and conscience, and both authorise departure from a rule of positive law when its enforcement leads to unfair results. The main difference between them is, however, to be sought in the overall reliance of equity on the concept of natural law, and of *istihsān* on the underlying values and principles of the *Shari'ah*. But this difference need not be overemphasised if one bears in mind the convergence of values between the *Shari'ah* and natural law. Notwithstanding their different approaches to the question of right and wrong, for example, the values upheld by natural law and the divine law of Islam are substantially concurrent. Briefly, both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard that is ultimately independent of human cognizance and adherence. But natural law differs from divine law in its assumption that right and wrong are inherent in nature.² From an Islamic perspective, right and wrong are determined, not by reference to the 'nature of things', but because God has determined them as such. The *Shari'ah* is an embodiment of the will of God, the Lord of the universe and the supreme arbiter of values. If equity is defined as a law of nature superior to all other legal rules, written or

otherwise, then this is obviously not what is meant by *istihsān*. *Istihsān* does not recognise the superiority of any other law over the divine revelation, and the solutions it offers are for the most part based on principles that are upheld by divine law. Unlike equity, which is founded on the recognition of a superior law, *istihsān* does not seek to constitute an independent authority beyond the *Sharī'ah*. *Istihsān*, in other words, is an integral part of the *Sharī'ah*, and differs with equity in that the latter recognises a natural law apart from, and essentially superior to, positive law.³

While discussing the general theory of *istihsān*, this chapter also draws attention to two main issues concerning this subject. One of these is whether or not *istihsān* is a form of analogical reasoning: is it to be regarded as a variety of *qiyās* or does it deserve to stand as a principle of equity in its own right? The other issue to be raised is the controversy over the validity of *istihsān*, which started with al-Shāfi'i's unambiguous rejection of this principle. A glance at the existing literature shows how the 'ulamā' are preoccupied with the polemics of *istihsān* and have differed on almost every aspect of the subject. I shall therefore start with a general characterisation of *istihsān*, and then discuss the authority that is quoted in its support. This will be followed by a brief account of the related concepts of *ra'y* and *qiyās*. The discussion will end with an account of the controversy over *istihsān* and a conclusion where I have tried to see the issues in a fresh light, with a view to developing a perspective on *istihsān*.

Istihsān is an important branch of *ijtihād*, and has played a prominent role in the adaptation of Islamic law to the changing needs of society. It has provided Islamic law with the necessary means with which to encourage flexibility and growth. Notwithstanding the measure of juristic technicality that seems to have been injected into an originally simple idea, *istihsān* remains basically flexible, and can be used for a variety of purposes, as will be discussed later. Yet because of its essential flexibility, the jurists have discouraged an over-reliance on *istihsān* lest it result in the suspension of the injunctions of the *Sharī'ah* and become a means of circumventing its general principles. *Istihsān* has thus become the subject of much controversy among our jurists. Whereas the Hanafi, Maliki and Hanbali jurists have validated *istihsān* as a subsidiary source of law, the Shāfi'i, Zāhiri and Shi'i 'ulamā' have rejected it altogether and refused to give it any credence in their formulation of the legal theory of *uṣūl al-fiqh*.⁴

Istihsān literally means 'to approve or to deem something prefer-

able'. It is a derivation from *ḥasana*, which means being good or beautiful. In its juristic sense, *istihsān* is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law. 'Juristic preference' is a fitting description of *istihsān*, as it involves setting aside an established analogy in favour of an alternative ruling that serves the ideals of justice and public interest in a better way.

Enforcing the existing law may prove to be detrimental in certain situations, and a departure from it may be the only way of attaining a fair solution to a particular problem. The jurist who resorts to *istihsān* may find the law to be either too general or too specific and inflexible. In both cases, *istihsān* may offer a means of avoiding hardship and generating a solution that is harmonious with the higher objectives of the *Sharī'ah*. It has been suggested that the ruling of the second caliph, 'Umar ibn al-Khaṭṭāb, not to enforce the *ḥadd* penalty of the amputation of the hand for theft during a widespread famine, the ban he imposed on the sale of slave-mothers (*ummahāt al-awlad*), and marriage with *kitābiyyahs* in certain cases, were all instances of *istihsān*;⁵ for 'Umar set aside the established law in these cases on grounds of public interest, equity and justice.⁶

Istihsān essentially consists of giving priority to *maṣlahah* over the ruling of *qiyās* in the event of a conflict arising between them. This is the essence of the Maliki *istihsān*, which consists of a recourse to unrestricted reasoning (*al-istidlāl al-mursāl*) that is given priority over *qiyās*, in the event where *qiyās* violates *maṣlahah*. The general objectives of the *Sharī'ah* must, in other words, take priority over the ruling of a particular *qiyās*.

The Hanafi jurist al-Sarakhsi (d. 483 AH) considers *istihsān* to be a method of seeking facility and ease in legal injunctions. It involves a departure from *qiyās* in favour of a ruling that dispels hardship and brings about ease to the people. 'Avoidance of hardship [*raf' al-haraj*]' al-Sarakhsi adds, 'is a cardinal principle of religion which is enunciated in the Qur'an, where we read, in an address to the believers, that "God intends facility for you, and He does not want to put you in hardship" (al-Baqarah 2:185)'.

يريد الله بكم اليسر ولا يريد بكم العسر

Al-Sarakhsi substantiates this further by quoting the *ḥadīth* that reads: 'The best of your religion is that which brings ease to the people.'⁷

غير دينكم أيسره.

Al-Khudari has rightly explained that in their search for solutions to problems, the Companions and Successors resorted in the first place to the Qur'an and the normative example of the Prophet. But when they found no answer in these sources, they exercised their personal opinion (*ra'y*), which they formulated in the light of the general principles and objectives of the *Shari'ah*. This is illustrated, for example, in the judgement of 'Umar ibn al-Khattab in the case of Muhammad ibn Maslamah. The caliph was approached by Ibn Maslamah's neighbour who asked for permission to extend a water canal through Ibn Maslamah's property, and he was granted the request on the ground that no harm was likely to come to Ibn Maslamah, whereas extending a water canal was to the manifest benefit of his neighbour.⁸

It thus appears that *istihsan* is essentially a form of *ra'y* that gives preference to the best of the various solutions that may exist for a particular problem. In this sense, *istihsan* is an integral part of Islamic jurisprudence and indeed of many other areas of human knowledge. Hence it is not surprising to note Imam Malik's observation that '*istihsan* represents nine-tenths of human knowledge'. While quoting this view, Abū Zahrah adds that when Malik made this remark, he was apparently including the broad concept of *maṣlahah* within the purview of *istihsan*, 'for it is *maṣlahah* which accounts for the larger part of the nine-tenths'.⁹

Evidence suggests that the Companions and Successors were not literalists who would seek a specific authority in the revealed sources for every legal opinion (*fatwā*) they issued. On the contrary, their rulings were often based on their understanding of the general spirit and purpose of the *Shari'ah*, and not necessarily on the narrow and literal meaning of its principles. *Istihsan* has been formulated in this spirit; it is the antidote to literalism and takes a broad view of the law which must serve, not frustrate, the ideals of fairness and justice.

To give an example, oral testimony is the standard form of evidence in Islamic law on which a consensus (*ijmā'*) can be claimed to exist. This normally requires two upright (*ʿadl*) witnesses unless the law provides otherwise (the proof of *zinā*, for instance, requires four witnesses). The number of witnesses required in these cases is prescribed in the Qur'an, but the rule that testimony should be given orally is determined by consensus. Muslim jurists have insisted on oral

testimony and have given it priority over other methods of proof, including confession and documentary evidence. In their view, the direct and personal testimony of a witness who speaks before the judge with no intermediary is the most reliable means of discovering the truth. The question arises, however, whether one should still insist on oral testimony at a time when other methods such as photography, sound recording, laboratory analyses, etc. offer at least equally, if not more, reliable methods of establishing facts. Here we have, I think, a case for a recourse to *istihsan* that would give preference to these new and often more reliable means of proof. It would mean departing from the established rules of evidence in favour of an alternative ruling that is justified in light of new circumstances. The rationale of this *istihsan* would be that the law requires evidence in order to establish the truth, and not the oral testimony for its own sake. If this is the real spirit of the law, then recourse to *istihsan* would seem to offer a better way to uphold that spirit.

The jurists are not in agreement on a precise definition for *istihsan*. The Hanafis have, on the whole, adopted Abū al-Hasan al-Karkhi's (d. 340 AH) definition, which they consider accurate and comprehensive. *Istihsan* is accordingly a principle that authorises departure from an established precedent in favour of a different ruling for a reason stronger than the one obtained in that precedent. While quoting this, al-Sarakhsi adds that the precedent set aside by *istihsan* normally consists of an established analogy that may be abandoned in favour of a superior proof, that is, the Qur'an, the *Sunnah*, necessity (*darurah*), or a stronger *qiyās*.¹⁰

The Hanbali definition of *istihsan* also seeks to relate *istihsan* closely to the Qur'an and the *Sunnah*. Thus according to Ibn Taymiyyah, *istihsan* is the abandonment of one legal norm (*hukm*) for another that is considered better on the basis of the Qur'an, *Sunnah* or consensus.¹¹

Notwithstanding the fact that the Mālikī jurists lay greater emphasis on *istiṣlāḥ* (consideration of public interest) and are not significantly concerned with *istihsan*, they have in principle validated *istihsan*. But the Mālikīs view *istihsan* as a broad doctrine, somewhat similar to *istiṣlāḥ*, which is less stringently confined to the Qur'an and *Sunnah* than the Hanafīs and Hanbalīs would have it. Thus according to Ibn al-ʿArabī, '*istihsan* is to abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its own objectives.' Ibn al-ʿArabī points out that the essence of *istihsan* is to act on 'the stronger of two indications [*dalilayn*]'.

Whereas the majority of 'ulamā' would hold to *qiyās* when it is attacked on grounds of rigidity, Mālik and Abū Hanīfah departed from *qiyās*, or specified the general in *qiyās*, on grounds of *maṣlahah* and other indications.¹²

There are certain differences in the terms of these definitions which will hopefully become clearer as our discussion proceeds. But it appears that departure from an existing precedent on grounds of more compelling reasons is a feature of *istihsān* that is common to all the foregoing definitions. According to Abū Zahrah, the Hanafīs have adopted al-Karkhī's definition because it embraces the essence of *istihsān* in all of its various forms. The essence of *istihsān*, Abū Zahrah adds, is to formulate a decision that sets aside an established analogy for a reason that justifies such a departure and seeks to uphold a higher value of the *Sharī'ah*.¹³ The departure to an alternative ruling in *istihsān* may be from an apparent analogy (*qiyās jalī*) to a hidden analogy (*qiyās khafī*), or to a ruling that is given in the *naṣṣ* (i.e. the Qur'ān or the *Sunnah*), consensus, custom or public interest.

There is no direct authority for *istihsān*, either in the Qur'ān or in the *Sunnah*, but the jurists have quoted both in their arguments for it. The opponents of *istihsān* have, on the other hand, argued that *istihsān* amounts to a deviation from the principles of the *Sharī'ah*. It is an idle exercise in human preferences which only detracts from our duty to rely exclusively on divine revelation. Both sides have quoted the Qur'ān and the *Sunnah* in support of their arguments. They were able to do so partly because the Qur'ānic *āyāt* they have quoted are on the whole open to various interpretations.

The Hanafī jurists have mainly quoted two Qur'ānic *āyāt*, both of which employ a derivation of the root word *ḥasana*, and enjoin the believers to follow the best of what they hear and receive. They are as follows:

Those who listen to the word and follow the best of it (al-Zumar, 39:18).

الَّذِينَ يَسْتَمْعُونَ الْقَوْلَ فَيَتَّبِعُونَ أَحْسَنَهُ

And follow the best of what has been sent down to you from your Lord (al-Zumar, 39:55).

وَاتَّبِعُوا أَحْسَنَ مَا أُنْزِلَ إِلَيْكُم مِّن رَّبِّكُمْ

Qawl (lit. 'word' or 'speech') in the first *āyah* could mean either the

word of God, or any other speech. If it means the former, which is more likely, then the question arises as to whether one should distinguish between the words of God which are *aḥsan* (the best) as opposed to those which are merely *hasan* (good). Some commentators have suggested that the reference here is to a higher course of conduct. The Qur'ān, in other words, distinguishes a superior course of conduct from that which may be considered as ordinary. Punishing the wrongdoer, for example, is the normal course enjoined by the *Sharī'ah*, but forgiveness may at times be preferable (*aḥsan*) and would thus represent the higher course of conduct. The basic concept of *istihsān*, in other words, can be seen in the Qur'ān, although not in its technical form, which the 'ulamā of jurisprudence have developed.¹⁴

The following two *ḥadīth* have also been quoted in support of *istihsān*:

What the Muslims deem to be good is good in the sight of God.¹⁵

مَا رَأَى الْمُسْلِمُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ.

No harm shall be inflicted or reciprocated in Islam.¹⁶

لَا ضَرَرَ وَلَا ضِرَارَ فِي الْإِسْلَامِ.

Al-Sarakhsī has elaborated in his *Uṣūl*¹⁷ that listening to the words of God and following them to the best of one's ability can mean two things to a jurist: firstly, to exert oneself by way of *ijtihād* and the best that *ra'y* can achieve in understanding those parts of the Qur'ān that have been left open to the exercise of *ra'y*. This is the case, for example, with regard to determining the quantity of the gift of consolation (*mu'ah*), which the Qur'ān itself has not specified but merely stated that 'a fair gift is due from those who wish to do what is right' (al-Baqarah, 2:241).

متاع بالمعروف حقا على المتقين

Mu'ah should therefore be determined in line with the financial capability and means at one's disposal, provided that it conforms to the Qur'ānic stipulation of *bi'l mā nif* (fair, equitable). What is required in this *āyah*, al-Sarakhsī added, is to exercise one's best judgement that is based on the predominance of *ra'y*, which is what is involved in *istihsān*. In another place the Qur'ān lays down the obligation in

respect of the maintenance and clothing of children, to be provided by the father in manner that is decent and fair (*bi'l-mā' nāf*) (al-Baqarah, 2:233). But once again the text here does not specify quantities. There is little doubt, al-Sarakhsī added, about the substance of this variety of *istihsān* and the jurists are generally in agreement with it. I may hasten to add here that this is, in fact, one of the two main varieties of *istihsān* that al-Jaṣṣāṣ (d. 370 AH) had earlier identified as 'the determination of the quantitative aspects of textual rulings which is for the *mujtahid* to specify' (*ithbāt al-maqādir al-mawkulāh ilā ijtihādihā*). The other variety of *istihsān* that al-Jaṣṣāṣ has discussed concerns the abandonment of *qiyās* for an alternative ruling that is deemed to be preferable. The *āyah* under discussion, namely 'to listen to the word and follow the best of it', al-Sarakhsī wrote, could also be understood in reference to the underlying proof of *qiyās*. The proof (*dalīl*) that conflicts with an obvious *qiyās* but is then discovered, after consideration and deeper thought, to be the stronger evidence, and provides a better understanding of the Sharī'ah and a preferable course of action. This is what lies at the centre of juristic *istihsān*, the intellectual effort, that is, to distinguish between the stronger evidence and that which is merely plausible, in reference to a particular *hukm*.

The critics of *istihsān* have argued, however, that none of the foregoing provide a definite authority in support of this doctrine. Regarding the first of the two *āyāt*, for example, Āmidī points out that it merely praises those who follow the best of what they hear. There is no indication in this *āyah* to render adherence to the 'best speech' an obligation. Nor does the second *āyah* bind one to search for the best in revelation: if there is an injunction in the revealed sources, it will bind the individual regardless of whether it is the best of the revelation or otherwise.¹⁸ As for the Tradition, 'What the Muslims deem good is good in the sight of God', both al-Ghazālī and Āmidī have observed that, if anything, this provides the authority for consensus (*ijmā'*). There is nothing in this Tradition to suggest, and indeed it would be arbitrary to say so, that what the Muslim individual deems good is also good in the sight of God.¹⁹ The critics of *istihsān* have further suggested that this doctrine was initially introduced by Hanafī jurists in response to certain urgent situations. The Hanafīs then tried to justify themselves by quoting the Qur'ān and the *ḥadīth ex-post facto*. The Qur'ānic foundation of *istihsān*, in other words, is weak, and no explicit authority for it can be found in the *Sunnah* either.²⁰

The historical origins of *istihsān* can clearly be traced back to the Companions, especially the decision of the Caliph 'Umar ibn al-

Khaṭṭāb to postpone the prescribed punishment for theft during the year of the famine, evidently on the grounds that applying the normal rules under such conditions would fail to obtain justice and may even amount to oppression. The Caliph is also on record as having made two different decisions concerning a case of inheritance, known as *al-mushtarakaḥ* (discussed below), the second of which set aside the normal rules of inheritance and provided a solution that seemed equitable and just under the circumstances. The facts of these decisions leaves little doubt as to the historical origins of *istihsān*, and yet we often read in many reputable texts of *uṣūl al-fiqh* the attribution of *istihsān* to Imam Ḥanīfah and his disciple al-Shaybānī. This may be understood to be referring mainly to the technical development of *istihsān*. Although 'Umar ibn al-Khaṭṭāb actually exercised the basic notion and idea of *istihsān*, he probably did not use the term, nor did he attempt to identify what he did as a proof or principle of *uṣūl al-fiqh*.

The word *istihsān* appears to have been used, even before Imam Ḥanīfah, by an early Umayyad jurist, Iyās ibn Mu'āwiyah (d. 122 AH). He is on record as having given the following instruction: 'Use *qiyās* as a basis of judgement insofar as it is beneficial to the people, but when it leads to undesirable results, then use juristic preference [*fa'stahnū*].'²¹ This clearly indicates that even before Abū Ḥanīfah, *istihsān* was known as a principle by which to correct the irregularities of *qiyās*. Ibn al-Muqaffā' (d. 137 AH), a state secretary of the early Abbasid period, observed that discretion cannot be precluded in the adjudication of matters that are not regulated in the textual sources. To attain justice and fairness in accordance with the spirit of the Qur'ān and the *Sunnah*, it is necessary to exercise discretion. Ibn al-Muqaffā' declared that unreserved adherence to *qiyās* sometimes led to injustice and it was in such instances that a certain degree of flexibility was advisable: '*Qiyās* is only an evidence that should be applied for good results ... but when it leads to unfairness and injustice, one must abandon it; for the objective of the law is not adherence to *qiyās* as such, but to judge according to what is good and appropriate.'²²

I. Ra'y, Qiyās and Istihsān

Istihsān is closely related to both *ra'y* and analogical reasoning. As already stated, *istihsān* usually involves a departure from *qiyās* in the first place, and then the departure in question often means giving preference to one *qiyās* over another. Broadly speaking, *qiyās* is the logical extension of an original ruling of the Qur'ān, the *Sunnah* (or

even *ijmā'*) to a similar case for which no direct ruling can be found in these sources. *Qiyās* in this way extends the *ratio legis* of divine revelation through the exercise of human reasoning. There is, in other words, a rationalist component to *qiyās* which consists, in the most part, of recourse to personal opinion (*ra'y*). This is also true of *istihsān*, which relies even more heavily on *ra'y*. It is this rationalist tendency verging on personal opinion in both *qiyās* and *istihsān* that has been the main target of criticism by al-Shāfi'i and others. Thus the controversy over the validity of *istihsān* is essentially similar to that encountered with regard to *qiyās*.²² However, because of its closer identity with the Qur'an and the *Sunnah*, *qiyās* has gained wider acceptance as a principle of jurisprudence. But even so, *qiyās* and *istihsān* are both considered to be expressive of rationalist tendencies in a system of law that must keep a close identity with its origins in divine revelation. In the centre of this controversy lies the question of the validity or otherwise of recourse to personal opinion (*ra'y*) in the development of the *Shari'ah*.

From an historical vantage point, it will be noted that in their recourse to personal opinion, the Companions were careful not to exercise *ra'y* at the expense of the *Sunnah*. This concern over possible violation of the *Sunnah* was greater in those days when the *hadīth* had not yet been compiled nor consolidated. With the territorial expansion of the Islamic domain under the Umayyads, and the dispersal of jurists and Companions who were learned in the *hadīth*, direct access to them became increasingly difficult. Fear of isolating the *Sunnah* led the jurists to lay down certain rules which restricted free recourse to *ra'y*. In order to be valid, the jurists ruled, *ra'y* must derive its authority from the *Shari'ah* principles that are enunciated in the Qur'an and the *Sunnah*. This was the genesis of *qiyās*, which was initially a disciplined form of *ra'y*. However, the exercise of this relatively liberal form of *ra'y* during the formative stages of jurisprudence had already led to considerable disagreement among the *fuqahā'*. Those who called for a close adherence to the *hadīth*, namely the *ahl al-hadīth*, mainly resided in the holy cities of Mecca and Medina. The *ahl al-hadīth* regarded the *Sunnah* as supplementary to the Qur'an. They insisted on strict adherence to the *Sunnah*, which, in their view, was a basic requirement of the faith. Acceptance of the faith, they argued, must be on a dogmatic basis without referring to the rationale or causes (*ta'līl*) of its ordinances. They were, in other words, literalists who denied the *mujtahid* the liberty to resort to the basic rationale of the *Shari'ah* rules. Whenever they failed to find explicit authority in the

sources concerning a particular problem, they chose to remain silent and avoided recourse to *ra'y*; this they considered to be the essence of piety and unquestioning submission to God.

The *fuqahā'* of Iraq, on the other hand, resorted more liberally to personal opinion, which is why they are known as *ahl al-ra'y*. In their view, the *Shari'ah* was in harmony with the dictates of reason. Hence they had little hesitation in referring, during their search for solutions to legal problems, to both the letter and the spirit of the *Shari'ah* ordinances. The *ahl al-ra'y* are thus known for their frequent resort to analogical reasoning and *istihsān*.

As will be shown in the following pages, *istihsān* reflects an attempt on the part of the *fuqahā'* to regulate the free exercise of *ra'y* in matters of law and religion. Any restrictions imposed on *istihsān*, such as that which sought to turn *istihsān* into a technical formula, were basically designed to tilt the balance, in the continuous debate about the use of *ra'y* versus literalism, in favour of the latter. Yet those who saw *istihsān* as a predominantly rationalist doctrine had reservations about subjecting it to restrictions that eroded its rationalist content and rendered it a mere subdivision of *qiyās*.

Although the classical theory of *uṣūl al-fiqh* tacitly recognised that in some cases analogical reasoning might entail injustice and that it was then permissible to resort to *istihsān*, this was, however, not to be regarded as 'giving human reason a sovereign role'. *Istihsān* and *maṣlahah* were to be applied strictly in the absence of a specific ruling in the Qur'an or the *Sunnah*.²³

II. *Qiyās Jālī*, *Qiyās Khafī* and *Istihsān*

Qiyās jālī, or 'obvious analogy', is straightforward *qiyās* that is easily intelligible to the mind. An oft-quoted example of this is the analogy between wine and another intoxicant, say a herbal drink, both of which have in common the effective cause ('illah) of being intoxicating. Hence the prohibition concerning wine is analogically extended to the intoxicant in question. But *qiyās khafī*, or 'hidden analogy', is a more subtle form of analogy in the sense that it is not obvious to the naked eye but is intelligible only through reflection and deeper thought. *Qiyās khafī*, which is also called *istihsān* or *qiyās mustahsan* (preferred *qiyās*) is stronger and more effective in repelling hardship than *qiyās jālī*, presumably because it is arrived at not through the superficial observation of similitudes, but through deeper reflection and analysis.

According to the majority of jurists, *istihsān* consists of a departure from *qiyās jalī* to *qiyās khafī*. When the jurist is faced with a problem for which no ruling can be found in a definitive text (*naṣṣ*), he may search for a precedent and try to find a solution by means of analogy. His search for alternatives may reveal two different solutions, one of which is based on an obvious analogy and the other on a hidden analogy. If there is a conflict between the two, then the former must be rejected in favour of the latter. For the hidden analogy is considered to be more effective, and therefore preferable to the obvious analogy. This is one form of *istihsān*. But there is another type of *istihsān* which mainly consists of making an exception to a general rule of the existing law when the jurist is convinced that justice and equity will be better served by making such an exception. The jurist might have reached this decision as a result of his personal *ijtihād*, or the exception may have already been authorised by any of the following: *naṣṣ*, *ijmāʿ*, approved custom, necessity (*ḍarūrah*) or considerations of public interest (*maṣlaḥah*).²⁴ These will be illustrated in the examples that follow. The examples chosen will also show more clearly the role that *istihsān* has played in the development of *fiqh*.

(1) To give an example of *istihsān* that consists of a departure from *qiyās jalī* to *qiyās khafī*, it may be noted that under Hanafi law, the *waqf* (charitable endowment) of cultivated land includes the transfer of all the ancillary rights that are attached to the property, such as the right of water (*haqq al-shurb*), right of passage (*haqq al-murūr*) and the right of flow (*haqq al-masīl*), even if these are not explicitly mentioned in the instrument of *waqf*. This ruling is based on *qiyās khafī* (or *istihsān*), as I shall presently explain. It is a rule of the Islamic law of contract, including the contract of sale, that the object of contract must be clearly identified in detail. What is not specified in the contract, in other words, is not included therein. Now if we draw a direct analogy (i.e. *qiyās jalī*) between sale and *waqf* – as both involve the transfer of ownership – we must conclude that the attached rights can only be included in the *waqf* if they are explicitly identified. It is, however, argued that such an analogy would lead to inequitable results: the *waqf* of cultivated lands, without its ancillary rights, would frustrate the basic purpose of *waqf*, which is to facilitate the use of the property for charitable purposes. To avoid hardship, a recourse to an alternative analogy, namely to *qiyās khafī*, is therefore warranted. The hidden analogy in this case is to draw a parallel, not with the contract of sale, but with the contract of lease (*ijārah*). For both of these involve a transfer of usufruct (*intifāʿ*). Since usufruct is the essential purpose

of *ijārah*, this contract is valid, on the authority of a *ḥadīth*, even without a clear reference to the usufruct. This alternative analogy with *ijārah* would enable us to say that *waqf* can be validly concluded even if it does not specify the attached rights to the property in detail.

To give another example, supposing A buys a house in a single transaction from B and C at a price of £40,000 payable in instalments. A pays the first instalment of £2,000 to B assuming that B will hand over C's portion to him. But before this happens, B loses the £2,000 and the question arises as to who should suffer the loss. By applying *qiyās jalī*, B and C should share the loss. For B received the money on behalf of the partnership and not for himself alone. Their position in sharing the loss, in other words, is analogous to their status as partners in the first place. But by applying *istihsān*, only B, who received the money, suffers the loss, for C, although a partner, was basically under no obligation to obtain his portion of the £2,000 from B. It was only his right/privilege, and he would be at the liberty to waive it. C's portion of the 2,000 pounds would consequently become a part of the remainder of the price (or the debt) that A owed to both. Only B is therefore to suffer the loss. The solution is based on the subtle analogy that one who is under no obligation should not have to pay any compensation either.

In a mortgage transaction, the mortgagee is liable to compensate for the loss of the mortgaged property in his possession. But in the case where the creditor-mortgagee has absolved the debtor-mortgagor of the obligation of repaying the loan, he is not held liable to compensate for the loss of the mortgaged property. The reason is that a trustee is not liable for the loss of the property in his custody unless he is at fault or negligent. Supposing the above-mentioned creditor had not waived his claim to the sum lent to the mortgagor, all he would have to bear would be to absolve the mortgagor from the obligation of repayment. Should one then punish him for his act of generosity absolving the mortgagor of the obligation to repay the loan, or would it be preferable to treat this case as analogous to that of a trustee? Here is a subtle analogy that is resorted to in order to avoid the grave injustice that would result from the strict application of obvious analogy.²⁵

(2) The second variety of *istihsān* consists of making an exception to a general rule of the existing law, which is why some writers have called this type 'exceptional *istihsān*' (*istihsān istithnāʿī*), as opposed to 'analogical *istihsān*' (*istihsān qiyāsī*) – the latter consisting of a departure from one *qiyās* to another.²⁶ Of these two, exceptional *istihsān* is

considered to be the stronger, for it derives support from another recognised source, especially when this is the Qur'an or the *Sunnah*. The scholars of various schools are generally in agreement on the validity of the *istihsān* for which authority can be found in the primary sources, but they have disputed *istihsān* that is based on *qiyās khafi* alone. In fact the whole controversy over *istihsān* focuses on this latter form of *istihsān*.²⁷ But more to the point, the authority for an exceptional *istihsān* may be given either in the *naṣṣ*, or in one of the other recognised proofs, namely consensus (*ijmā'*), necessity (*ḍarūrah*), custom (*'urf* or *'ādah*) and public interest (*maṣlaḥah*). We shall illustrate each of these separately, as follows:

(a) An example of the exceptional *istihsān* that is based in the *naṣṣ* of the Qur'an is its ruling on bequests to relatives: 'It is prescribed that when death approaches any of you, if he leaves any assets, that he makes a bequest to parents and relatives' (al-Baqarah 2:180).

كتب عليكم إذا حضر أحدكم الموت إن ترك خيراً الوصية
لوالدين والأقربين

This Qur'anic provision represents an exception to a general principle of the *Sharī'ah*, namely that a bequest is basically not valid: since bequest regulates the division of the estate after the death of the testator, the latter is not allowed to accelerate this process. A bequest made during the lifetime of the testator is thus tantamount to interference in the rights of the heirs after the testator's death, which is unlawful. However, the Qur'an permits bequest as an exception to the general rule, that is by way of an exceptional *istihsān*. It sets aside the general principle in favour of an exception which aims for a fair distribution of wealth in the family, especially in cases where a relative is destitute and yet is excluded from inheritance in the presence of other heirs.

(b) Exceptional *istihsān* that is based on the *Sunnah* may be illustrated with reference to the contract of *ijārah* (lease or hire). According to a general rule of the *Sharī'ah* law of contract, an object that does not exist at the time of contract may not be sold. However, *ijārah* has been validated despite its being the sale of the usufruct (i.e. in exchange for rent) which is usually non-existent at the moment the contract is concluded. Analogy would thus invalidate *ijārah*, but *istihsān* exceptionally validates it on the authority of the *Sunnah* (and *ijmā'*), proofs that are stronger than analogy and justify a departure from it.²⁸

Similarly, the option of cancellation (*khiyār al-shart*) represents an

exceptional *istihsān* that is authorised by the *Sunnah*. It is employed when a person buys an object on condition that he may revoke the contract within the next three days or so. This kind of stipulation amounts to a departure from the general rule of the *Sharī'ah* law of contract, which is that a contract becomes binding upon its conclusion. An exception to this rule has however been made by way of *istihsān* which is based on the *ḥadīth*: 'When you agree on the terms of a sale, you may say: it is not binding and I have an option for three days.'²⁹

قوله صلى الله عليه وسلم: إذا بايعت فقل: لا حلاية ولي
الخيار ثلاثة أيام.

(c) To illustrate exceptional *istihsān* that is authorised by *ijmā'*, we may refer to *istighnā'*, or the contract for the manufacture of goods. Recourse to this form of *istihsān* is made when someone places an order with a craftsman for certain goods to be made at a price that is determined at the time of the contract. *Istihsān* validates this transaction despite the fact that the object of the contract is non-existent at the time the order is placed. This form of *istihsān* closely resembles that which is authorised by custom, as will later be discussed.³⁰

(d) An example of exceptional *istihsān* that is based on necessity (*ḍarūrah*) is the method adopted for the purification of polluted wells. If a well, or a pond for that matter, is contaminated by impure substances, its water may not be used for ablution. It will be noted, however, that the water in the well cannot be purified by removing that part which is impure – and it cannot be poured out either, for it is in continuous contact with the water which flows into the well. The solution has been found through *istihsān*, which provides that contaminated wells can be purified by removing a certain number, say a hundred, of buckets of water from the well (the exact number is determined with reference to the type and intensity of pollution). *Istihsān* in this case is validated by reason of necessity and prevention of hardship to the people.³¹

In a similar vein, strict analogy requires that witnesses, in order to be admissible, must in all cases be *'adl*, that is, upright and irreproachable. For judicial decisions must be founded on truth, and this is facilitated by the testimony of just witnesses. However, if the *qāḍī* happens to be in a place where *'adl* witnesses cannot be found, then it is his duty, by virtue of *istihsān*, to admit witnesses who are

not totally reliable so that the rights of the people can be protected.³² Similarly, with regard to the *qāḍī*, the general rule requires that he be a *mujtahid*, but a non-*mujtahid* may be appointed as a *qāḍī* where no *mujtahid* can be found for this office.

The Ḥanafī jurists have frequently resorted to this variety of *istihsān* in the area of property law, especially regarding the unauthorised use of the property of another person because of necessity and prevention of harm. For example: (1) It is permissible for the father or the son, in the event of one of them falling ill, to buy out of his property what may be necessary, such as food and medicine, without obtaining prior permission. (2) On a similar note, a travelling companion may spend out of the property of his co-traveller who has fallen ill what may be necessary to help the latter without his prior permission. (3) The indigent father who is in need of financial support is normally not allowed to interfere with the property of his adult son, in the absence of the latter, simply because the father's right of guardianship terminates upon the son's attainment of the legal age. Imam Abū Ḥanīfah has however held, by way of *istihsān*, that the father may sell only the moveable, but not the real, property of his adult son for his basic needs. The two disciples of the Imam, namely Abū Yūsuf and al-Shaybānī have, however, disagreed with their Imam. In all of these examples the permission of the right-bearer is taken for granted on account of necessity and *maṣlahah*.

(c) To illustrate exceptional *istihsān* that is authorised by custom, we may refer to the *waqf* of moveable goods. Since *waqf*, by definition, is the endowment of property on a permanent basis, and moveable goods are subject to destruction and loss, they are therefore not to be assigned in *waqf*. This general rule has, however, been set aside by the Ḥanafī jurists, who have validated the *waqf* of moveables such as books, tools and weapons on grounds of its acceptance by popular custom.³³ Similarly, a strict analogy would require that the object of sale be accurately defined and quantified. However, popular custom has departed from this rule in the case of entry to public baths where the users are charged a fixed price without any agreement on the amount of water they use or the duration of their stay.³⁴ Another example is *bay' al-ta'āfi*, or sale by way of 'give and take', where the general rule that offer and acceptance must be verbally expressed is not applied owing to customary practice.

(f) And finally, to illustrate *istihsān* that is founded on considerations of public interest (*maṣlahah*) we may refer to the responsibility of a trustee (*amīn*) for the loss of the goods that he receives in his custody.

The general rule here is that the trustee is not responsible for loss or damage to such property unless it can be attributed to his personal fault or negligence (*taḥsīr*). Hence a tailor, a shoemaker or a craftsman is not accountable for the loss of goods in his custody should they be stolen or destroyed by fire. But the jurists, including Abū Yūsuf and al-Shaybānī, have set aside the general rule in this case and have held, by way of *istihsān*, the trustee to be responsible for such losses, unless the loss in question is caused by a calamity, such as fire or flood, which is totally beyond his control. This *istihsān* has been justified on grounds of public interest so that trustees and tradesmen may exercise greater care in safeguarding people's property.

For another example of *maṣlahah*-based *istihsān*, we refer to a case of inheritance, known as *al-mushtarakah* ('the apportioned'), which took place during the time of the Caliph 'Umar ibn al-Khaṭṭāb. A woman died leaving behind a full brother and two half-brothers, her mother and her husband. The normal rules of inheritance would entitle the full brother to one-third, the husband to one-half, the mother to one-sixth and nothing would be left for the half-brothers who are in the category of *ʿaṣabah* (residuary) and take a share only after the recipients of Qur'ānic shares have taken theirs. The case was brought to the attention of the Caliph who ruled by way of *istihsān* that the half-brothers should share the one-third with the full brothers. A number of prominent Companions, including 'Alī ibn 'Abbās and 'Abd Allāh ibn Ma'sūd, held the view that the normal rules of inheritance should apply. Report also has it that the Caliph 'Umar too was initially persuaded to follow the normal rules until the half-brothers protested and said: 'Suppose that our father were a donkey [*himār*], did we not still have the same mother as the deceased?' – which is why the case is also known as *al-himariyyah* ('the donkey' case). It is said that 'Alī's solution was based on *qiyās* whereas 'Umar's solution was based on *istihsān* and this was deemed to be more equitable and in harmony with considerations of *maṣlahah*.³⁵

III. The Ḥanafī-Shāfi'ī Controversy over *Istihsān*

Al-Shāfi'ī has raised serious objections against *istihsān*, which he considers to be a form of pleasure-seeking (*taladhḥudh wa-hawā*) and arbitrary law-making in religion.³⁶ A Muslim must obey God and His Messenger at all times, and follow injunctions that are enshrined in the clear texts (*nusūṣ*). Should there arise any problem or difference of opinion, it must be resolved with reference to the Qur'an and the

Sunnah. In support of this, al-Shāfi'i quotes the Qur'anic *naṣṣ* in *sūra al-Nisā* (4:59): 'Should you dispute over a matter among yourselves, refer it to God and His Messenger, if you do believe in God and the Last Day.'

فإن تنازعتم في شيء فردوه إلى الله والرسول إن كنتم
تؤمنون بالله واليوم الآخر

Al-Shāfi'i continues on the same page: anyone who rules or gives a *fatwā* on the basis of a *naṣṣ* or on the basis of *ijtihād* that relies on an analogy to the *naṣṣ* has fulfilled his duty and has complied with the command of the Lawgiver. But anyone who prefers that which neither God nor His Messenger has commanded or approved, his preference will be acceptable neither to God nor to the Prophet. *Istihsān* involves, according to al-Shāfi'i, personal opinion, discretion and the inclination of the individual jurist, an exercise that is not in harmony with the Qur'anic *āyah* that reads: 'Does man think that he will be left without guidance?' (al-Qiyāmah, 75:36).

أبحسب الإنسان أن يترك سدى

Commentators are in agreement that *sudā* in this *āyah* means a state of lawlessness in which the individual is not subject to any rules, commands or prohibitions. With this meaning in mind, Imam Shāfi'i observes: if every judge and every *mufīṭ* ruled according to their own inclinations, one can imagine that self-indulgence and chaos would afflict the life of the community. Unlike *qiyās*, whose propriety can be tested by the methodology to which it must conform, *istihsān* is not regulated as such. Since *istihsān* consists neither of *naṣṣ* nor of an analogy to *naṣṣ*, it is *ultra vires* and must therefore be avoided.³⁷

In response to this critique, the Hanafīs have asserted that *istihsān* is not an arbitrary exercise in personal preference. It is a form of *qiyās* (viz., *qiyās khaffī*), and is no less authoritative than *qiyās*. Thus it is implied that, contrary to allegations of the Shāfi'i jurists, *istihsān* is not an independent source of law, but a branch of *qiyās* that has a firm grounding in the *Shari'ah*. If this argument is accepted, it would imply that *istihsān* must be subjected to the same rules that are applicable to *qiyās*, and would therefore lose its status as a juristic principle in its own right. The scope and flexibility of *istihsān* would consequently be restricted as it would mean changing *istihsān* from a predominantly

equitable doctrine into a form of analogical reasoning. This would confine *istihsān* only to matters on which a parallel ruling could be found in the primary sources. Having said this, however, it is doubtful whether *istihsān* is really just another form of *qiyās*.

Aḥmad Hasan has observed that *istihsān* is more general than *qiyās khaffī*, as the former embraces a wider scope and can apply to matters beyond the confines of the latter.³⁸ Aghnides has similarly held that *istihsān* is a new principle which goes beyond the scope of *qiyās*, whether or not this is openly admitted to be the case:

Abū Hanīfah and his earliest disciples did not consider *istihsān* as a kind of *qiyās*...nor did he use the word in any technical sense. Had that been the case, like so many of his views, it would probably have been placed on record. The fact is that he used the word *istihsān* in its usual meaning, namely, that of abandoning *qiyās* for an opinion thought to be more subservient to the social interest.³⁹

Aghnides goes on to suggest that when the Shāfi'i jurists attacked *istihsān* on the grounds that it meant a setting aside of the revealed texts, the disciples of Abū Hanīfah felt themselves forced to show that this was not the case. Hence they put forward the contention that *istihsān* was nothing but another kind of *qiyās*. According to another observer, the attempt to bring *istihsān* within the sphere of *qiyās* is unjustified, for 'it really lies outside of this narrow sphere and must therefore be recognised as a special form of deduction'.⁴⁰

Al-Ghazālī has criticised *istihsān* on different grounds. He has observed that the jurists of the Shāfi'i school have recognised the validity of *istihsān* that is based on an indication (*dalīl*) from the Qur'an or *Sunnah*. When there exists a *dalīl* of this kind, then the case at hand would be governed not by *istihsān* but directly by the provision of the Qur'an or *Sunnah* itself.⁴¹ Furthermore, al-Ghazālī is critical of Abū Hanīfah for his departure, in a number of cases, from a sound *hadīth* in favour of *qiyās* or *istihsān*.⁴² Finally, al-Ghazālī rejects *istihsān* that is based on popular custom, for custom by itself is not a source of law. He observes that approved customs are often justified with reference, not to *istihsān*, but to other proofs. While referring to the example of entry to a public bath for a fixed price without quantifying the consumption of water, al-Ghazālī asks: 'How is it known that the community adopted this practice by virtue of *istihsān*? Is it not true that this was the custom during the time of the Prophet, in which case it becomes a tacitly approved *Sunnah* [*Sunnah taqrīriyyah*] so as to prevent hardship to the people?'⁴³

Another Shāfi'i jurist, al-ʿAmīdī, has stated that notwithstanding his

explicit denunciation of *istihsān*, al-Shāfi'i himself resorted to *istihsān*. Al-Shāfi'i has been quoted as having used a derivation of *istihsān* on several occasions, including the ruling in which he said, 'I approve [*astahsinu*] of *mu'ah* [gift of consolation] to be 30 dirhams'; and 'I approve [*astahsinu*] of the proof of pre-emption [*shuf'*] to be three days' (following the date when the sale of the property in question came to the knowledge of the claimant). Al-Āmidī thus draws the conclusion that 'there is no disagreement on the essence of *istihsān* between the two schools',⁴⁴ which obviously means that their differences amount to no more than semantic differences over words.

The Mālikī jurist al-Shātibī has held that *istihsān* does not mean the pursuit of one's desires; on the contrary, a jurist who understands *istihsān* has a profound understanding of the intention of the Lawgiver. When the jurist discovers that a strict application of analogy to a new problem leads to loss of *maṣlahah* and possibly to an evil (*mafsadah*), he must set aside *qiyās* and resort to *istihsān*.⁴⁵

While discussing the controversy over *istihsān*, another observer, Shaykh al-Khudārī, writes that anyone who is familiar with the works of the 'ulama' of jurisprudence would agree that Abū Hanīfah and his disciples are not alone in their reliance on *istihsān*. All jurists have resorted to *istihsān* in one form or another, and a reader of the various juristic schools of thought is bound to come across opinions that are founded on it.⁴⁶

This view finds further support from Yūsuf Mūsā, who has tersely observed that juristic differences over *istihsān* essentially amount to no more than arguments over words, for the *fuqahā'* of every major school have invariably resorted to *istihsān* in one form or another.⁴⁷

If this is accepted, then one naturally wonders as to the causes that might explain the controversy in question. Al-Taftāzānī has observed that neither of the two sides of the controversy over *istihsān* have understood one another, and that the whole debate is due to a misunderstanding. Those who argue in favour of *istihsān* have perceived this principle differently to those who have argued against it. Had *istihsān* been properly understood, al-Taftāzānī adds, its basic validity would never have been disputed.⁴⁸

Al-Taftāzānī's assessment has been widely endorsed by modern writers on the subject, including Khallāf, Abū Zahrah and Yūsuf Mūsā. In Khallāf's opinion, the essential validity of *istihsān* is undeniable, for it enables a departure from the apparent or the general rule of law to a variant ruling that warrants such a departure. Every judge and jurist must consider the circumstances of an individual case, and occasion-

ally decide not to apply a certain rule, or to make an exception, as he considers this to be required by *maṣlahah* and justice.⁴⁹ And lastly, Abū Zahrah observes that 'one exception apart, none of al-Shāfi'i's criticisms are relevant to the Hanafī conception of *istihsān*'. The one exception that may bear out some of al-Shāfi'i's criticisms is *istihsān* that is authorised by custom. For custom is not a recognised source of law and is, in any case, not sufficiently authoritative to warrant a departure from *qiyās*.⁵⁰

IV. *Istihsān* and Particularisation (*Takhṣīs*)

Another controversy has arisen over whether or not *istihsān* is in the nature of *takhṣīs*. There are two aspects to this discussion, one of which addresses the question of whether *istihsān* is tantamount to specifying a general rule (*hukm*) of Sharī'ah, or a ruling of *qiyās*, in connection with a certain issue; and the other is an extension of the same point, but this time in reference to specifying the effective cause ('illah) and through it the *hukm* rather than specifying the *hukm* directly without a particular reference to the 'illah. The Mālikīs have described *istihsān* as acting on particular benefit (*maṣlahah juz'īyyah*) vis-à-vis a general principle by way of making an exceptional concession. This process resembles that of *takhṣīs al-'umūm*, or specifying a general text in order to uphold the spirit and purpose of that text. By resorting to *istihsān*, in other words, we are basically concerned with a better understanding of a general principle of Sharī'ah and its proper implementation with reference to particular issues. Both Imams Abū Hanīfah and Mālik saw *istihsān* as the case where the application of *qiyās* in a particular instance departed from its own effective cause. While both Imams saw *istihsān* as a form of *takhṣīs*, the main difference between their respective approaches may be said to be that Imam Mālik took a broader view of both *takhṣīs* and *istihsān*, by opening up their scope to the requirements of *maṣlahah*, and specified a general text by reference to *maṣlahah*. Imam Abū Hanīfah would, on the other hand, do so if this was upheld by a Companion.⁵¹

The Hanbalī scholar Ibn Taymiyyah saw *istihsān* as a kind of particularisation of 'illah where the cause of the original *hukm* – which is being abandoned – is present but the *hukm* of that 'illah is absent due to an obstacle. According to Ibn Taymiyyah, when the 'illah is rational and when the *mujtahid* can understand it, then it may be either completely rejected or modified so as to accommodate certain new cases which can be distinguished from the original case. It is in

this way that Ibn Taymiyyah considered *istihsān* to be in the nature of *takhṣīs al-'illah*, either through the modification of the 'illah or through its total nullification.

The opponents of *istihsān* have, on the other hand, asserted that *istihsān* violates one of the basic norms of rationality and law by isolating the 'illah from its *ḥukm*, or when it makes an exception to the ruling (*ḥukm*) of a case despite the presence of its effective cause ('illah). Stated simply, *takhṣīs al-'illah* means the existence of a cause and the absence or suspension of its relevant ruling due to an obstacle. The Hanafis have disagreed and replied that *istihsān* is not in the nature of *takhṣīs al-'illah*; *istihsān* is a kind of *qiyās*. When we apply *istihsān*, the rule of law is established if the cause of that rule exists; in the event that the cause does not exist, the rule too does not exist.⁵² Ṣadr al-Sharī'ah has categorically stated that *istihsān* is not in the nature of *takhṣīs al-'illah*, despite the assertion of many to the contrary. This is because abandoning a *qiyās* for a stronger evidence is not *takhṣīs al-'illah*. Thus the absence of a *ḥukm* in the case of *istihsān* is precisely due to the absence of an 'illah, and not particularisation thereof. This is illustrated by reference to the oft-quoted example of permissibility for human consumption of the leftovers of birds of prey, as opposed to the leftovers of predatory animals, which is prohibited, simply because the 'illah of its prohibition, namely eating or drinking with the tongue, is present in the case of predators, but is absent in the case of birds of prey. *Qiyās* in this case would extend the prohibition from the case of predatory animals to birds of prey, but *istihsān* would exclude the latter from the scope of that prohibition because of the absence of the effective cause.⁵³ Al-Sarakhsī has strongly criticised those who validated the particularisation of 'illah. In his *Uṣūl*, he wrote a chapter bearing the title 'Explaining the Corrupt View that Validates *Takhṣīs* of the Sharī' Causes – *Faṣl fī Bayān Faṣād al-Qawl bi-Jawāz al-Takhṣīs fī'l-'Ilal al-Sharī'iyyah*' and said that the approved position of our predecessors was that *takhṣīs al-'illah* was impermissible. Those who validate this logical incongruity, Sarakhsī added, are saying, in effect, that a *ḥukm* of Sharī'ah may be applied to some cases and may be suspended in other similar cases, while the 'illah is present in both cases, and what they say is totally corrupt and indefensible.⁵⁴

Conclusion

The attempt to link *istihsān* with *qiyās* has involved tortuous reasoning which somehow remains less than convincing. One way to

resolve some of the juristic differences on this issue may be to go back to the origin of *istihsān* and recapture the meaning that was given to it by Abū Ḥanīfah and the early 'ulama' of jurisprudence. On this point there is evidence to suggest that Abū Ḥanīfah (d. 150 AH) did not conceive of *istihsān* as an analogical form of reasoning. About half a century later, when al-Shāfi'i wrote his *Risālah* and *Kitāb al-Umm*, there was still little sign of a link between *istihsān* and *qiyās*. Al-Shāfi'i is, in fact, completely silent on this point. Had al-Shāfi'i (d. 204 AH) known that *istihsān* was a variety of *qiyās*, one can imagine that he might have softened his stand with regard to it. Originally *istihsān* was conceived in a wider and relatively simple form which was close to its literal meaning and free of the complexities that were subsequently woven into it. One is here reminded of Imam Mālik's characteristic statement that designates *istihsān* as nine-tenths of human knowledge, a statement which grasps the true essence of *istihsān* as a method of finding better and more equitable alternatives to existing problems both within and beyond the confines of analogical reasoning. *Istihsān* is basically antithetic to *qiyās* and not a part of it. It enables the jurist to escape from strict conformity to the rules of *qiyās* when such conformity is likely to lead to unfair results. *Istihsān* was originally formulated not as another variety of *qiyās*, but as a doctrine that liberated the jurist from the strait-jacket of *qiyās*, especially where conformity to *qiyās* clashed with the higher objectives of the Sharī'ah.

It is well to remember that much of the juristic controversy over *istihsān* developed under the pressure of conformity to the strict requirements of the legal theory once it was finally formulated by al-Shāfi'i and gradually accepted by others. The thrust of al-Shāfi'i's effort in formulating the legal theory of the *uṣūl* was to define the role of reason vis-à-vis the revelation. Al-Shāfi'i confined the scope of human reasoning in law to analogy alone. In his well-known statement concerning *ijtihād* and *qiyās*, especially where al-Shāfi'i considered the two to be synonymous, one hardly fails to notice the attempt to confine the use of human reasoning to *qiyās* alone: 'On all matters touching the life of a Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihād*, and *ijtihād* is *qiyās*.⁵⁵ In this statement, al-Shāfi'i reflected the dominant mood of his time. From that point onward, any injection of rationalist principles into the legal theory of the *uṣūl* had to seek justification through *qiyās*, which was the only channel through which a measure of support could be

obtained for *istihsān*. In order to justify *istihsān* within the confines of the legal theory, it was initially equated with *qiyās* and eventually came to be designated a sub-division of it.

The next issue over which the *fuqahā'* have disagreed is whether an *istihsān* founded in the Qur'ān, *Sunnah* or *ijmā'* should be called *istihsān* at all. In cases where a *hadīth* authorises departure from an existing analogy in favour of an alternative ruling, then all that one needs in order to authorise the departure in question is the *hadīth* itself. It would therefore seem redundant to apply the word *istihsān* to this form of departure from the rules of *qiyās*. Whenever a ruling can be found in the Qur'ān (or the *Sunnah*), the jurist is obliged to follow it and should, basically, have no choice of resorting to *qiyās* or to *istihsān*. If the Qur'ān provides the choice of an alternative ruling that seems preferable, then the alternative in question is still a Qur'ānic rule – not *istihsān*.

It would appear that the *fuqahā'* initially used the term *istihsān* close to its literal sense, which is to 'prefer' or to deem something preferable. The literal meaning of *istihsān* was naturally free of the restrictions that were later evolved by the *fuqahā'*. A measure of confusion between the literal and technical meanings of *istihsān* probably existed ever since it acquired a technical meaning in the usage of the jurists. This distinction between the literal and juristic meanings of *istihsān* might help explain why some 'ulamā' have applied *istihsān* to the rulings of the Qur'ān, the *Sunnah*, and *ijmā'*. When we say that the Qur'ān, by way of *istihsān*, permitted bequests to be made during the lifetime of the testator, we are surely not using *istihsān* in its technical/juristic sense – that is, giving preference to one *qiyās* over another or making an exception to an existing legal norm – but merely saying that the Qur'ān preferred one of the two conceivable solutions in that particular case. When the Qur'ān authorises bequests, then one might say that it has established a legal norm in its own right regardless as to whether it can be described as an exception to another norm or not. To regard this Qur'ānic ruling as an *istihsān* can only be true if *istihsān* is used in its literal sense, for, as a principle of jurisprudence, *istihsān* can add nothing to the authority of the Qur'ān and the *Sunnah*. Although one might be able to find the genesis of *istihsān* in the Qur'ān, this would have nothing to do with the notion of constructing *istihsān* as an alternative to, or a technique of escape from, *qiyās*. Furthermore, to read *istihsān* into the lines of the Qur'ān would seem superfluous in the face of the legal theory of the *uṣūl* that there is no room for rationalist doctrines such as *istihsān* in the event that a ruling

can be found in the *nuṣūṣ*. Notwithstanding the fact that many observers have considered Abū al-Hasan al-Karkhī's definition to be the most acceptable, my enquiry leads to the conclusion that the Mālikī approach to *istihsān* and Ibn al-ʿArabī's definition of it, is wider in scope, and probably closest to the original conception of *istihsān*, for it does not seek to establish a link between *istihsān* and *qiyās*.

Istihsān has undoubtedly played a significant role in the development of Islamic law, a role that is sometimes ranked even higher than that of *qiyās*. Notwithstanding a measure of reticence on the part of the 'ulamā' to highlight the role of *istihsān*, in reality it features most prominently in bridging the gap between law and social realities by enabling the jurist to pay individual attention to circumstances and the peculiarities of particular problems. But for reasons that have already been explained, the *fuqahā'* have exercised restraint in the use of *istihsān*, which, as a result, has not been utilised to the maximum of its potential. Hence, it is not surprising to note that a certain gap between theory and practice has developed in Islamic law.⁴⁰ The potentials of *istihsān* could hardly be translated into reality unless *istihsān* is stripped of its unwarranted accretions. The only consideration that needs to be closely observed in *istihsān* is whether there is a more compelling reason to warrant a departure from an existing law. The reason that justifies resort to *istihsān* must not only be valid in *Sharīʿah* but must serve a higher objective of it and must therefore be given preference over the existing law that is deemed unfair. Since *istihsān* enables a choice between alternative solutions, it assesses the relative merits and demerits of each of the alternatives. The existing law is always the base on which an alternative is devised through *istihsān*. In this sense, *istihsān* offers considerable potential for innovation and for imaginative solutions to legal problems. The aim in *istihsān* is not merely to find a solution to a particular problem but to find a better solution than the one that already exists. It therefore calls for a higher level of analysis and refinement, which must in essence transcend the existing law and analogy.

The potential for new alternatives in *istihsān* would thus be considerably restricted if it were to be subjected to the requirements of *qiyās*. The two are essentially designed for different purposes and each must be allowed to function in its best capacity. Analogy essentially extends the logic of the Qur'ān and the *Sunnah*, whereas *istihsān* is designed to tackle the irregularities of *qiyās*. Thus it would seem methodologically incorrect to amalgamate the two into a single formula.

Istihsān has admittedly not played a noticeable role in the legal and

judicial practices of our times. It has, as it were, remained in the realm of controversy, which may partly be explained by the dominance of the phenomenon of *taqlid* in shaping the attitude of lawyers and judges towards *istihsān*. Only the rulings of the jurists of the past have been upheld on *istihsān*, and even this has not been totally free of hesitation. Muslim rulers and judges have made little or no use of *istihsān* either in developing existing law or in the day-to-day administration of justice. This is patently unjustified, especially in view of the eminent suitability of *istihsān* in the search for fair and equitable solutions.

Istihsān can best be used as a method by which to improve the existing law, to strip it of impractical and undesirable elements and to refine it by means of making necessary exceptions. *Istihsān*, in other words, generally operates within the confines of the legal *status quo* and does not seek a radical change in the existing law, although it has considerable potential to effect innovation and refinement.

Judges and lawyers are generally reluctant to depart from the existing law, or to make exceptions to it, even in the face of evidence that a departure would be in the interests of fairness and justice. Their reluctance is often due to the reticence in the law as to precisely what role the judge has to play in such a situation. Judges are normally expected to enforce the law at all costs, and often have little choice in the matter regardless of the circumstances or results. Alternatively, it may be that the judges are, in fact, doing this – departing from the law when it seems patently unfair – without openly acknowledging what they are doing. In any case, it would seem advisable for the legislature to explicitly authorise the judge to resort to *istihsān* when he considers this to be the only way of achieving a fair solution in a case under consideration. In this way, *istihsān* would hopefully find a place in the day-to-day administration of justice and would consequently encourage flexibility and fairness in law and judicial practice. Judicial decisions would, in turn, influence legislation and contribute to attaining a more refined and equitable legal order. A clear and well-defined role for *istihsān* would hopefully mark a new opening in the evolutionary process of Islamic law.

NOTES

1. Osborn's *Concise Law Dictionary*, on p. 124, defines equity as follows: 'Primarily fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity

inherent in those principles. Equity is the body of rules formulated and administered by the Court of Chancery to supplement the rules and procedure of the Common Law.'

2. For a discussion see Kerr, *Islamic Reform*, p. 57.
3. Makdisi, 'Legal Logic', p. 90.
4. For details see Šabūnī, *Madkhal*, pp. 119ff.
5. *Umm al-walad* is a female slave who has borne a child to her master, and who is consequently free at his death. A *kitābīyah* is a woman who is a follower of a revealed religion, namely Christianity and Judaism.
6. Cf. Ahmad Hasan, *Early Development*, p. 145.
7. Sarakhsi, *Mabṣūṭ*, X, 145; Ibn Hanbal, *Musnad*, V, 22.
8. Khudārī, *Tārīkh*, p. 199. Ibn Hāzim, *al-Muḥalla*, VIII, 353.
9. Abū Zahrah, *Uṣūl*, p. 107 and 215. Imam Mālik's characterisation of *istihsān* also appears in Šāṭibī, *Muwāfaqāt* (ed. Diraz), IV, 208.
10. Sarakhsi, *Mabṣūṭ*, X, 145.
11. Ibn Taymiyyah, *Maṣ'alah al-Istihsān*, p. 446.
12. 'Al-Istihsān huwa tark muqtadā al-dalīl 'ala tartīf al-istithnā' wa'l-tarakkhish li-mu'andah mā yir'ād bihi fi ho'a muqtadayānih.' See Ibn al-'Arabī, *Ahkām al-Qur'ān*, II, 57. A discussion of Ibn al-'Arabī's definition also appears in Šāṭibī, *Muwāfaqāt*, (ed. Diraz), IV, 208.
13. Abū Zahrah, *Uṣūl*, p. 207.
14. Yusuf Ali's commentary to *The Holy Qur'ān*, p. 1241, n. 4169.
15. Amidi (*Ihkām*, I, 214) considers this to be a *ḥadīth* but it is more likely to be a saying of the prominent companion, 'Abd Allāh ibn Mas'ūd; see also Šāṭibī, *Iṭīfāq*, II, 319.
16. Ibn Mājāh, *Sunan*, II, 784, *ḥadīth* no. 2340; Šāṭibī, *Muwāfaqāt* (ed. Diraz), III, 17; Khudārī, *Tārīkh*, p. 199.
17. Sarakhsi, *Uṣūl*, II, 200.
18. Amidi, *Ihkām*, IV, 159.
19. *Ibid.*, p. 160; Ghazālī, *Mustafāḥ*, I, 138.
20. Ahmad Hasan, 'The Principle of *Istihsān*', p. 347.
21. Ibn al-Muqaffā', *Risālah*, p. 125. Abū Sulaymān, *al-Fikr*, p. 152.
22. For further on *qiyās* see Kamālī, 'Qiyās (Analogy)' in *The Encyclopedia of Religion*, XII, pp. 128ff.
23. Coulson, *Conflicts*, pp. 6–7.
24. Šāṭibī, *Uṣūl*, p. 100.
25. Khallāf, *Ilm*, p. 82; Nabhānī, *Muqaddimah*, p. 67.
26. Note the use of these terms e.g. in Šabūnī, *Madkhal*, p. 123.
27. Thus the Mālikī jurist Ibn al-Hājjib classifies *istihsān* into three categories of accepted (*maqbūl*), rejected (*marḍūḍ*) and uncertain (*mutaraddid*), adding that *istihsān* which is based on stronger grounds is acceptable to all. But *istihsān* which can find no support in the *naṣṣ*, *ijmā'* or *qiyās* is generally disputed. See Ibn al-Hājjib, *Mukhtaṣar*, II, 485.
28. Cf. Mūsā, *Madkhal*, p. 197; Khallāf, *Ilm*, p. 82. For *ḥādīth* that validate various types of *ijmā'* (land, labour, animals, etc.) see Ibn Rushd, *Bidayah*, II, 220–1.
29. *Ṣaḥīḥ al-Bukhārī* (trans. Khan), III, 575, *ḥadīth* no. 893; Šabūnī, *Madkhal*, pp. 123–4.

30. See Abū Zahrah, *Uṣūl*, p. 211.
31. *Ibid.*, pp. 211–12.
32. Cf. Šābūnī, *Madkhal*, p. 221.
33. *Ibid.*, p. 221.
34. Shāṭibī, *ʿItisām*, II, 318.
35. Ibn Rushd, *Bidayāh*, II, 290; Šābūnī, *Madkhal*, p. 125; Zarqā, *Madkhal*, I, 87.
36. Shāfiʿī, *Kitāb al-Umm*, 'Kitāb Iḥāl al-Iṣṭihṣān', VII, 271.
37. *Ibid.*, VII, 271.
38. Ahmad Ḥasan, 'The Principle of *Iṣṭihṣān*', p. 352.
39. Agnides, *Muhammadian Theories*, p. 73.
40. Paret, 'Iṣṭihṣān and Iṣṭislāh', *Encyclopedia of Islam*, new edn, IV, 256.
41. Ghazālī, *Mustaṣḍā*, I, 137.
42. Ghazālī criticises Abū Ḥanīfah's ruling with regard, for example, to implementing the punishment of *zinā* on the testimony of four witnesses, each of whom point at a different corner of the room where *zinā* is alleged to have taken place. This is a case, according to Ghazālī, of doubt (*shubḥa*) in the proof of *zinā* which would prevent the enforcement of the *ḥadd* penalty. For according to a *ḥadīth*, *ḥudūd* are to be dropped in all cases of doubt. Abū Ḥanīfah's ruling is based on *iṣṭihṣān*, apparently on the grounds that disbelieving the Muslims (*takdhib al-muslimin*) is reprehensible. Ghazālī regards Abū Ḥanīfah's ruling as whimsical and a form of *iṣṭihṣān* that should not be followed (*Mustaṣḍā*, I, 139).
43. *Ibid.*, II, 138.
44. Amidi, *Iḥkām*, IV, 157.
45. Shāṭibī, *Muwāfaqāt* (ed. Diraz), IV, 206.
46. Khudārī, *Tārīkh*, p. 201.
47. Mūsā, *Madkhal*, p. 198.
48. Taftāzānī, *Tabṣir*, p. 82. It is not certain whether Taftāzānī was a Hanafī or a Shāfiʿī. In a bibliographical notation on Taftāzānī, it is stated that he is sometimes considered himself a Hanafī and sometimes a Shāfiʿī. See *al-Mawṣūʿah al-Fiqhiyyah*, I, 344.
49. Khallāf, *ʿIlm*, p. 83; Mūsā, *Madkhal*, p. 197.
50. Abū Zahrah, *Uṣūl*, p. 115.
51. Cf. Shāṭibī, *Muwāfaqāt*, IV, 208; Miqā, *al-Raʿy*, p. 401 and 426.
52. Ibn Taymiyyah, *Maʿālah al-Iṣṭihṣān*, pp. 458ff; Yusuf, 'The Theory of *Iṣṭihṣān*', p. 65.
53. Šadr al-Sharīʿah, *al-Tawḍīḥ*, III, 10; *Mawṣūʿah*, IV, 46; Hasan, *Analogical Reasoning*, p. 422.
54. See for further details Sarakhṣī, *Uṣūl*, II, 208–10.
55. Shāfiʿī, *Risālah*, p. 206.
56. Joseph Schacht has devoted a chapter to the subject, entitled 'Theory and Practice' where he elaborates on how the gap between the law and social realities has widened. See *Introduction to Islamic Law*, pp. 76–86.

CHAPTER THIRTEEN

Maṣlaḥah Mursalah (Considerations of Public Interest)

Literally, *maṣlaḥah* means 'benefit' or 'interest'. When it is qualified as *maṣlaḥah mursalah*, however, it refers to unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no textual authority can be found on its validity or otherwise.¹ It is synonymous with *iṣṭislāh*, and is occasionally referred to as *maṣlaḥah muṭlaqah* on account of its being undefined by the established rules of the *Sharīʿah*. For al-Ghazālī, *maṣlaḥah* consists of considerations which secure a benefit or prevent a harm but which are, simultaneously, harmonious with the objectives (*maqāṣid*) of the *Sharīʿah*. These objectives, the same author adds, consist of protecting the five 'essential values', namely religion, life, intellect, lineage and property. Any measure that secures these values falls within the scope of *maṣlaḥah*, and anything which violates them is *mafsadah* ('evil'), and preventing the latter is also *maṣlaḥah*.² More technically, *maṣlaḥah mursalah* is defined as a consideration that is proper and harmonious (*wasf munāsib mulā'im*) with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the *Sharīʿah* provides no indication as to its validity or otherwise.³ The Companions, for example, decided to issue currency, to establish prisons, and to impose tax (*kharāj*) on agricultural lands in the conquered territories despite the fact that no textual authority could be found in favour of this.⁴ The 'ulamā' are in agreement that *iṣṭislāh* is not a proof in respect of devotional matters ('ibādāt) and the specific injunctions of the *Sharīʿah* (*muqaddarāt*). Thus the *muṣṣ* regarding prescribed penalties (*ḥudūd*) and penances (*kaffārāt*),

the fixed entitlements in inheritance (*farā'id*), the specified periods of 'iddah that divorced women must observe, and such other *ahkām* as are clear and decisive fall outside the scope of *istiṣlāḥ*. Since the precise values and causes of 'ibādāt cannot be ascertained by the human intellect, *ijtihād*, be it in the form of *istiṣlāḥ*, juristic preference (*istiḥsān*) or *qiyās*, does not apply to them. Furthermore, with regard to 'ibādāt and other clear injunctions, the believer is duty-bound to follow them as they are. But outside these areas, the majority of 'ulamā' have validated reliance on *istiṣlāḥ* as a proof of *Sharī'ah* in its own right.⁵

Istiṣlāḥ derives its validity from the norm that the basic purpose of legislation (*tashrī'*) in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm. The ways and means that bring benefit to the people are virtually endless. The *maṣāliḥ* (pl. of *maṣlahah*), in other words, can neither be enumerated nor predicted in advance as they change according to time and circumstance.⁶ To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances. The ruler and the *muftahid* must therefore be able to act in pursuit of the *maṣāliḥ* as and when these present themselves.⁷

The majority of 'ulamā' maintain that *istiṣlāḥ* is a proper ground for legislation. When the *maṣlahah* is identified and the *muftahid* does not find an explicit ruling in the *muṣṣ*, he must act in its pursuit by taking the necessary steps to secure it. This is justified by saying that God's purpose in revealing the *Sharī'ah* is to promote man's welfare and to prevent corruption in the earth. This is, as al-Shāṭibī points out, the purport of the Qur'ānic *āyah* in sūra al-Anbiyā' (21:107) where the purpose of the prophethood of Muḥammad is described in the following terms: 'We have not sent you but as a mercy for all creatures.'

وما أرسلناك إلا رحمة للعالمين

In another passage, the Qur'ān describes itself, saying: 'O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts' (Yūnus, 10:57).

يا أيها الناس قد جاءتكم موعظة من ربكم وشفاء لما في الصدور

The message here transcends all barriers that divide humanity; none

must stand in the way of seeking mercy and beneficence for human beings. Elsewhere, God describes His purpose in the revelation of religion, saying that it is not within His intentions to make religion a means of imposing hardship (al-Hajj, 22:78). This is confirmed elsewhere in sūra al-Mā'idah (5:6) where we read, in more general terms, that 'God never intends to impose hardship upon people.'⁸

ما يريد الله ليجعل عليكم من حرج

These are some of the Qur'ānic objectives that embrace the essence of *maṣlahah*; they are permanent in character and would be frustrated if they were to be subjected to the kind of restrictions that the opponents of *maṣlahah* have proposed. We shall discuss the views of the opponents of *maṣlahah* in fuller detail later; suffice it here to point out that their argument amounts to a proposition that the general objectives of the Qur'ān can only be implemented, in regard to particular cases, if there is another *naṣṣ* available in their support. This would seem to amount to an unwarranted restriction on the general objectives of the Lawgiver as these are expounded in the Qur'ān.

The 'ulamā' have quoted a number of *ḥadīth* that authorise acting upon *maṣlahah*, although none is in the nature of a clear *naṣṣ* on the subject. Particular attention is given, in this context, to the *ḥadīth* stating that 'no harm shall be inflicted or reciprocated in Islam'.⁹

لا ضرر ولا ضرار في الإسلام.

The substance of this *ḥadīth* is upheld in a number of other *ḥadīth*, and it is argued that this *ḥadīth* encompasses the essence of *maṣlahah* in all its varieties.¹⁰ Najm al-Dīn al-Tūfī, a Hanbali jurist (d. 716 AH), has gone so far as to maintain, as we shall further elaborate, that this *ḥadīth* provides a decisive *naṣṣ* on *istiṣlāḥ*. The widow of the Prophet, 'Ā'ishah, is reported to have said that 'the Prophet only chose the easier of two alternatives, so long as it did not amount to a sin'.¹¹

إنه ماخير بين أمرين إلا اختار أيسرهما ما لم يكن إثما.

According to another *ḥadīth*, the Prophet is reported to have said that 'Muslims are bound by their stipulations, unless it be a condition which turns a *ḥarām* into *ḥalāl* or a *ḥalāl* into a *ḥarām*'.¹²

المسلمون على شروطهم إلا شرطا أحلّ حراما أو حرّم حلالا.

This would seem to grant Muslims the liberty to pursue their benefits and to commit themselves to that end provided that this does not amount to a violation of the explicit commands and prohibitions of the *Sharī'ah*. In yet another *ḥadīth*, the Prophet is quoted to have said: 'God loves to see that His concessions [*nukhas*] are observed, just as He loves to see that His strict laws [*'aza'im*] are obeyed.'¹³

إن الله يحب أن تؤتى رخصه كما يحب أن تؤتى عزائمه.

This would confirm the doctrine that no unnecessary rigour in the enforcement of the *ahkām* is recommended, and that the Muslims should avail themselves of the flexibility and concessions that the Lawgiver has granted them and utilise them in pursuit of their *maṣāliḥ*. The rigorous approach that the *Zāhiri* '*ulamā'* have taken in regard to *maṣlaḥah*, as will later be discussed, tends to oppose the purport of this *ḥadīth*.

Technically, however, the concept of *maṣlaḥah mursalah* does not apply to the rulings of the Prophet. When there is a Prophetic ruling in favour of a *maṣlaḥah*, it becomes part of the established law, and hence no longer a *maṣlaḥah mursalah*. Historically, the notion of *maṣlaḥah mursalah* originated in the practice of the Companions. This is, of course, not to say that the Prophet did not rule in favour of *maṣlaḥah*, but merely to point out that as a principle of jurisprudence, *maṣlaḥah mursalah* does not apply to the rulings of the *Sunnah*.

The practice of the Companions, the Successors and the leading *mujtahidīn* of the past tends to suggest that they enacted laws and took measures in pursuance of *maṣlaḥah* despite the lack of textual authority to validate it. The Caliph Abū Bakr, for example, collected and compiled the scattered records of the Qur'ān in a single volume; he also waged war on those who refused to pay the *zakāh*; and he nominated 'Umar to succeed him.¹⁴ Similarly, 'Umar ibn al-Khaṭṭāb held his officials accountable for the wealth they had accumulated in abuse of public office and expropriated such wealth. He also poured away milk to which water had been added as a punishment to deter dishonesty in trade. Furthermore, 'Umar ibn al-Khaṭṭāb suspended the execution of the prescribed punishment for theft in a year of famine, and approved of the views of the Companions to execute a group of criminals for the murder of one person.¹⁵ These decisions were taken despite the

clear ruling of the Qur'ān concerning retaliation (*qisās*), which is 'life for life', and the Qur'ānic text on the amputation of the hand, which is not qualified in any way whatsoever. But the Caliph 'Umar's decision concerning *qisās* was based on the rationale that the lives of the people would be exposed to aggression if participants in murder were exempted from *qisās*. Public interest thus dictated the application of *qisās* to all who took part in murdering a single individual. Furthermore, the third Caliph, 'Uthmān, distributed the authenticated Qur'ān and destroyed all the variant versions of the text. He also validated the right to inheritance of a woman whose husband had divorced her in order to be disinherited. The fourth Caliph, 'Alī, is also on record as having held craftsmen and traders responsible for the loss of goods that were placed in their custody. This he considered to be for the *maṣlaḥah* of the people so that traders would take greater care in safeguarding people's property.¹⁶ In a similar vein, the '*ulamā'* of the various schools have validated the interdiction of the ignorant physician, the clowning *mufit* and the bankrupt trickster on grounds of preventing harm to the people. The *Mālikīs* have also authorised detention and *tā'zīr* for want of evidence of a person who is accused of a crime.¹⁷ In all these instances, the '*ulamā'* have aimed at securing the *maṣlaḥah mursalah* by following a *Sharī'ah*-oriented policy (*siyāsah shar'iyyah*), which is largely concurrent with the dictates of *maṣlaḥah*. As Ibn Qayyim has observed, *siyāsah shar'iyyah* comprises all measures that bring the people close to wellbeing [*ṣalāh*] and move them further away from corruption [*fasād*], even if no authority is found for them in divine revelation and the *Sunnah* of the Prophet.¹⁸

The main support for *istislāh* as a proof and basis of legislation (*tashrī'*) comes from Imam Mālik, who has given the following reasons in its favour. (1) The Companions have validated it and have formulated the rules of *Sharī'ah* on its basis. (2) When the *maṣlaḥah* is compatible with the objectives of the Lawgiver (*maqāsid al-shāri'*) or falls within the genus or category of what the Lawgiver has expressly validated, it must be upheld, for neglecting it under such circumstances is tantamount to neglecting the objectives of the Lawgiver, which is to be avoided. Hence, *maṣlaḥah* as such is a norm of the *Sharī'ah* in its own right; it is by no means extraneous to the *Sharī'ah* but an integral part of it. (3) When *maṣlaḥah* is of the genus of the approved *maṣāliḥ* and is not upheld, the likely result is the infliction of hardship on the people, which must be prevented.¹⁹

I. Types of Maṣlaḥah

The *maṣāliḥ* in general are divided into three types, namely, the 'essentials' (*ḍarūriyyāt*), the 'complementary' (*ḥājiyyāt*) and the 'embellishments' (*taḥsīniyyāt*). The *Sharī'ah* in all its parts aims at the realisation of one or the other of these *maṣāliḥ*. The 'essential' *maṣāliḥ* are those on which the lives of people depend, and whose neglect leads to total disruption and chaos. They consist of the five essential values (*al-ḍarūriyyāt al-khamsah*) namely religion, life, intellect, lineage and property. These must not only be promoted but also protected against any real or unexpected threat that undermines their safety. To uphold the faith would thus require observance of the prescribed forms of 'ibādāt, whereas the safety of life and intellect is secured by obtaining lawful means of sustenance as well as the enforcement of penalties which the *Sharī'ah* has provided so as to protect them against destruction and loss.²⁰

The *ḥājiyyāt* are on the whole supplementary to the five essential values, and refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Thus in the area of 'ibādāt the concessions (*nukḥaṣ*) that the *Sharī'ah* has granted to the sick and to the traveller, permitting them not to observe the fast and to shorten the *ṣalāh*, are aimed at preventing hardship. Similarly, the basic permissibility (*ibāḥah*) regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect.²¹

Certain interests are likely to be evaluated differently when they are seen from the viewpoint of the individual or the community respectively. An example of this is *sale*, which is an essential interest when it is seen from the viewpoint of the community as a whole, but it is likely to be downgraded to the second category of interests, that is, *ḥājiyyāt*, when it is seen from the viewpoint of a particular individual. Al-Shāṭibī has similarly observed that a certain act may be *mubāḥ* from the view point of individual interest, but may be elevated to *mandūb*, or even *uājib*, in respect of the community as a whole. Although the 'ulamā' have identified the essential interests as five, and according to a minority view as six, thus adding honour (*al-'ird*) to the list, this identification must remain open-ended, just as is the case with the *maṣāliḥ* as a whole. Nowadays, we may be inclined to include such things as economic development, employment and protecting the environment among the essential or complementary interests, depending on the priority they may command in a particular country

or under a given set of circumstances. The lawful government and the *ulā al-amr* should have the authority to identify and declare them as such, and then take the necessary measures for their realisation.

The 'embellishments' (*taḥsīniyyāt*, also known as *kamālīyyāt*) denote interests whose realisation leads to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and 'ibādāt, moral virtues, avoiding extravagance in consumption and moderation in the enforcement of penalties fall within the scope of *taḥsīniyyāt*.

It will be noted that the unrestricted *maṣlaḥah* does not represent a specific category of its own in the foregoing classification, for the obvious reason that it could fall into any of the three types of *maṣāliḥ*. Should it be the case that the realisation of *maṣlaḥah mursalah* is *sine qua non* to an essential *maṣlaḥah*, then the former becomes a part of the latter. Likewise, if *maṣlaḥah mursalah* happens to be a means to attaining one of the second classes of *maṣāliḥ*, then it would itself fall into that category, and so on. Furthermore, we may briefly add here the point that al-Shāṭibī has discussed at some length, that the *maṣāliḥ* are all relative (*nisbī*, *idāfi*) and as such, all the varieties of *maṣlaḥah*, including the essential *maṣāliḥ*, partake of a measure of hardship and even *mafsadah*. Since there is no absolute *maṣlaḥah* as such, the determination of value in any type of *maṣlaḥah* is based on the preponderance of benefit that accrues from it, provided that the benefit in question is in harmony with the objectives of the Lawgiver.²²

From the viewpoint of the availability or otherwise of a textual authority in its favour, *maṣlaḥah* is further divided into three types. First, there is *maṣlaḥah* that the Lawgiver has expressly upheld, and enacted a law for its realisation. This is called *al-maṣlaḥah al-mu'tabarah*, or accredited *maṣlaḥah*, such as protecting life by enacting the law of retaliation (*qisās*), or defending the right of ownership by penalising the thief, or protecting the dignity and honour of the individual by penalising adultery and false accusation. The Lawgiver has, in other words, upheld that each of these offences constitutes a proper ground (*waṣf munāsib*) for the punishment in question. The validity of *maṣlaḥah* in these cases is definitive and no longer open to debate. The 'ulamā' are in agreement that promoting and protecting such values constitutes a proper ground for legislation. The fact that the Lawgiver has upheld them is tantamount to His permission and approval of all measures, including legislation, that aim at their realisation.²³

But the *maṣāliḥ* that have been validated after divine revelation came to an end fall into the second class, namely the *maṣlaḥah mursalah*.

This too consists of a proper attribute (*waṣf munāsib*) to justify the necessary legislation, but since the Lawgiver has neither upheld nor nullified it, it constitutes *maṣlahah* of the second rank. For example, in recent times, the *maṣlahah* that prompted legislation in many Muslim countries, which provided that the claim of marriage or of ownership in real property, can only be proved by means of an official document, has not been explicitly validated by the *Sharī'ah*. The law on these points has thus upheld the unrestricted *maṣlahah*; more specifically, it is designed to prevent a *maṣṣadah*, which is the prevalence of perjury (*shahādah al-zūr*) in the proof of these claims.²⁴

The third variety of *maṣlahah* is the discredited *maṣlahah*, or *maṣlahah mulghā*, which the Lawgiver has nullified either explicitly or by an indication that can be found in the *Sharī'ah*. The 'ulamā' are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour. An example of this would be an attempt to give the son and the daughter an equal share in inheritance on the assumption that this will secure a public interest. But since there is a clear *naṣṣ* in the Qur'ān (al-Nisā', 4:11) that assigns to the son double the portion of the daughter, the apparent *maṣlahah* in this case is clearly nullified (*malghā*).²⁵

To summarise, when the *Sharī'ah* provides an indication, whether direct or implicit, on the validity of a *maṣlahah*, it falls under the accredited *maṣāliḥ*. The opposite of this is *maṣlahah mulghā*, which is overruled by a similar indication in the sources. The unrestricted *maṣlahah* applies to all other cases that are neither validated nor nullified by the *Sharī'ah*.

II. Conditions (*Shurūṭ*) of Maṣlahah Mursalah

The following conditions must be fulfilled in order to validate reliance on *maṣlahah mursalah*. These conditions are designed to ensure that *maṣlahah* does not become an instrument of arbitrary desire or individual bias in legislation.

(1) The *maṣlahah* must be genuine (*haqiqiyyah*), as opposed to a plausible *maṣlahah* (*maṣlahah wahmiyyah*) which is not a proper ground for legislation. A mere suspicion or specious conjecture (*tawahhum*) that a certain act of legislation will be beneficial, without ascertaining the necessary balance between its possible benefits and harms, is not sufficient. There must, in other words, be a reasonable probability that the benefits of enacting a *hukm* in the pursuance of *maṣlahah* outweigh the harms that might result from it. An example of a specious

maṣlahah, according to Khallāf, would be to abolish the husband's right of *talāq* by vesting it entirely in a court of law.²⁶

Genuine *maṣāliḥ* are those that aim to protect the five essential values noted above. Protecting the faith, for example, necessitates the prevention of sedition (*fitnah*) and of the propagation of heresy. It also means safeguarding freedom of belief in accordance with the Qur'ānic principle that 'there shall be no compulsion in religion' (al-Baqarah, 2:256).

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Similarly, safeguarding the right to live includes protecting the means which facilitate an honourable life such as the freedom to work, freedom of speech and freedom to travel. Protecting the intellect ('*ʿaql*) necessitates the promotion of learning and safeguards against calamities that corrupt the individual and make him a burden to society. Furthermore, safeguarding the purity of lineage (*nasl*) entails protection of the family and creation of a favourable environment for the care and custody of children. And lastly, the protection of property requires defending the right of ownership. It also means facilitating fair trade and the lawful exchange of goods and services in the community.²⁷

(2) The second condition is that the *maṣlahah* must be general (*kullīyyah*) in that it secures benefit, or prevents harm, to the people as a whole and not to a particular person or group of persons. This means that enacting a *hukm* on grounds of *istislāh* must hope to realise a benefit yielded to the largest possible number of people. It is not *maṣlahah* if it secures the interest of a few individuals regardless of their social and political status. The whole concept of *maṣlahah* derives its validity from the idea that it secures the welfare of the people at large.²⁸

(3) Lastly, the *maṣlahah* must not be in conflict with a principle or value that is upheld by *naṣṣ* or *ijmā'*. Hence the argument, for example, that *maṣlahah* in modern times would require the legalisation of usury (*ribā'*) on account of the change in the circumstances in which it is practised, comes into conflict with the clear *naṣṣ* of the Qur'ān. The view that *ribā'* in the way it is practised in modern banking does not fall under the Qur'ānic prohibition, as Abū Zahrah points out, violates the *naṣṣ* and therefore negates the whole concept of *maṣlahah*.²⁹ Imam Mālik has added two other conditions to the foregoing, one of which is that the *maṣlahah* must be rational (*ma'qūlah*) and acceptable to people of sound intellect. The other condition is that it must

prevent or remove hardship from the people, which is the express purpose of the Qur'ānic *āyah* in sūra al-Mā'idah (5:6) quoted above.³⁰

Furthermore, according to al-Ghazālī, *maṣlaḥah*, in order to be valid, must be essential (*al-maṣlaḥah al-darūriyyah*). To illustrate this, al-Ghazālī gives the example of when unbelievers in the battlefield take a group of Muslims as hostages. If the situation is such that the safety of all the Muslims and their victory necessitates the death of the hostages, then al-Ghazālī permits this in the name of *al-maṣlaḥah al-darūriyyah*.³¹ However, the weakness of al-Ghazālī's argument appears to be that the intended *maṣlaḥah* in this example entails the killing of innocent Muslims, and the *Sharī'ah* provides no indication to validate this.³²

III. Al-Ṭūfī's View of Maṣlaḥah Mursalah

Whereas the majority of jurists do not allow recourse to *istiṣlāḥ* in the presence of a textual ruling, a prominent Hanbali jurist, Najm al-Dīn al-Ṭūfī, stands out for his view, which authorises recourse to *maṣlaḥah* with or without the existence of *naṣṣ*. In a treatise entitled *al-Maṣāliḥ al-Mursalah*, which is a commentary on the *ḥadīth* that 'no harm shall be inflicted or reciprocated in Islam', al-Ṭūfī argues that this *ḥadīth* provides a clear *naṣṣ* in favour of *maṣlaḥah*. It enshrines the first and most important principle of *Sharī'ah* and enables *maṣlaḥah* to take precedence over all other considerations. Al-Ṭūfī precludes devotional matters, and specific injunctions such as the prescribed penalties, from the scope of *maṣlaḥah*. In regard to these matters, the law can only be established by the *naṣṣ* and *ijmā'*. If the *naṣṣ* and *ijmā'* endorse one another on '*ibādāt*, the proof is decisive and must be followed. Should there be a conflict of authority between the *naṣṣ* and *ijmā'*, but it is possible to reconcile them without interfering with the integrity of either, this should be done. But if this is not possible, then *ijmā'* should take priority over other indications.³³

As for transactions and temporal affairs (*ahkām al-mu'āmalāt wa al-siyāsiyyāt al-dunyāwīyyah*), al-Ṭūfī maintains that if the text and other proofs of *Sharī'ah* happen to conform to the *maṣlaḥah* of the people in a particular case, they should be applied forthwith; but if they oppose it, then *maṣlaḥah* should take precedence over them. The conflict is really not between the *naṣṣ* and *maṣlaḥah*, but between one *naṣṣ* and another, the latter being the *ḥadīth* of *la ḍarar wa la ḍirār fi'l-Islām*.³⁴ One must therefore not fail to act upon that text which materialises the *maṣlaḥah*. This process would amount to restricting

the application of one *naṣṣ* by reason of another *naṣṣ* and not to a suspension or abrogation thereof. It is a process of specification (*takhṣīṣ*) and explanation (*bayān*), just as the *Sunnah* is sometimes given preference over the Qur'ān by way of clarifying the text of the Qur'ān.³⁵

In the areas of transactions and governmental affairs, al-Ṭūfī adds, *maṣlaḥah* constitutes the goal whereas the other proofs are like the means; the end must take precedence over the means. The rules of *Sharī'ah* on these matters have been enacted in order to secure the *maṣāliḥ* of the people, and therefore when there is a conflict between a *maṣlaḥah* and *naṣṣ*, the *ḥadīth* *la ḍarar wa la ḍirār* clearly dictates that the former must take priority.³⁶ In short, al-Ṭūfī's doctrine, as Mahmassānī has observed, amounts to saying after each ruling of the text, 'Provided public interest does not require otherwise'.³⁷

IV. Differences between *Istiṣlāḥ*, Analogy and *Istiḥsān*

In his effort to determine the *shar'i* ruling on a particular issue, the jurist must refer to the Qur'ān, the *Sunnah* and *ijmā'*. In the absence of any ruling in these sources, he must attempt *qiyās* by identifying a common '*illah*' between a ruling of the text and the issue for which a solution is required. However, if the solution arrived at through *qiyās* leads to hardship or unfair results, he may depart from it in favour of an alternative analogy in which the '*illah*', although less obvious, is conducive to obtaining a preferable solution. The alternative analogy is a preferable *qiyās*, or *istiḥsān*. In the event, however, that no analogy can be applied, the jurist may resort to *maṣlaḥah mursalah* and formulate a ruling which, in his opinion, serves a useful purpose or prevents a harm that may otherwise occur.³⁸

It thus appears that *maṣlaḥah mursalah* and *qiyās* have a feature in common in that both are applicable to cases in which there is no clear ruling available in the *muṣṣaḥ* or *ijmā'*. They also resemble one another in the sense that the benefit that is secured by recourse to them is based on a probability, or *zann*, either in the form of an '*illah*' in the case of *qiyās*, or of a rational consideration that secures a benefit in the case of *maṣlaḥah mursalah*. However, *qiyās* and *maṣlaḥah* differ from one another in certain respects. The benefit that is secured by *qiyās* is founded on an indication from the Lawgiver, and a specific '*illah*' is identified to justify the analogy to the *naṣṣ*. But the benefit sought through *maṣlaḥah mursalah* has no specific basis in established law, whether in favour or against. *Maṣlaḥah mursalah* in other words

stands on its own justification, whereas *qiyās* is the extension of a ruling that already exists.

This explanation also serves to clarify the main difference between *maṣlaḥah* and *istiḥsān*. A ruling which is based on *maṣlaḥah mursalah* is original in the sense that it does not follow, or represent a departure from, an existing precedent. As for *istiḥsān*, it only applies to cases for which a precedent is available (usually in the form of *qiyās*), but *istiḥsān* seeks a departure from it in favour of an alternative ruling. This alternative may take the form of a hidden analogy (*qiyās khaffī*) or of an exception to a ruling of the existing law, each representing a variation of *istiḥsān*.³⁹

V. The Polemics over Maṣlaḥah

The main point in the argument advanced by the opponents of *istiḥlāḥ* is that the *Sharī'ah* takes full cognizance of all *maṣāliḥ*; it is all-inclusive and there is no *maṣlaḥah* outside the *Sharī'ah* itself. This is the view of the *Zāhirīs* and some *Shāfi'īs* like al-Āmidī, and the *Mālikī* jurist Ibn al-Ḥājib, who do not recognise *maṣlaḥah* as a proof in its own right. They maintain that the *maṣāliḥ* are all exclusively contained in the *nuṣūṣ*. When the *Sharī'ah* is totally silent on a matter, this is a sure sign that the *maṣlaḥah* in question is no more than a specious *maṣlaḥah* (*maṣlaḥah wahmiyyah*) that is not a valid ground for legislation.⁴⁰

The *Hanafīs* and the *Shāfi'īs* have, on the other hand, adopted a relatively more flexible stance, maintaining that the *maṣāliḥ* are either validated in the explicit *nuṣūṣ*, or indicated in the rationale ('illah) of a given text, or even in the general objectives of the Lawgiver. Only in the presence of a textual indication can *maṣlaḥah* constitute a valid ground for legislation. The identification of the causes ('ilal) and objectives, according to this view, entails the kind of enquiry into the 'illah that is required in *qiyās*. The main difference between this view and that of the *Zāhirīs* is that the former validates *maṣlaḥah* on the basis of the rationale and the objective of the *Sharī'ah* even in the absence of a specific *naṣṣ*. Both these views are founded on the argument that if *maṣlaḥah* is not guided by the values upheld in the *nuṣūṣ*, there is a danger of confusing *maṣlaḥah* with arbitrary desires, which might lead to corruption and *mafsadah*. Experience has shown that this has frequently occurred at the behest of rulers and governors who have justified their personal wishes in the name of *maṣlaḥah*. The way to avoid this is indicated in the Qur'ān in sūra al-Qiyāmah (75:36), where we read: 'Does man think that he has been left without guidance?'

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The *maṣlaḥah* must therefore be guided by the values that the Lawgiver has upheld. Hence there is no *maṣlaḥah* unless it is corroborated by an indication in the *Sharī'ah*.⁴¹ While commenting on *istiḥsān*, Imam Ghazālī writes: 'We know that the *maṣāliḥ* must always follow the *shar'ī* indications; *istiḥsān* is not guided by such indications and therefore amounts to no more than a whimsical opinion'. As for *maṣlaḥah mursalah*, al-Ghazālī maintains that when it is not approved by the Lawgiver, it is like *istiḥsān*.⁴² Al-Ghazālī recognises the 'accredited' *maṣlaḥah*, that is, when the *maṣlaḥah* is indicated in the *naṣṣ*. He also approves of *maṣlaḥah mursalah* when it is based in definite necessity, that is, *maṣlaḥah ḍarūriyyah*. In the absence of a definite necessity, al-Ghazālī maintains that *maṣlaḥah* is not valid. Consequently, al-Ghazālī does not approve of the remaining two classes of the *maṣāliḥ*, namely the complementary (*hājīyyāt*), and the embellishments (*taḥsīniyyāt*).⁴³ By making the stipulation that the *maṣlaḥah*, in order to be valid, must be founded on definite necessity, however, al-Ghazālī is no longer speaking of *maṣlaḥah mursalah*, but of necessity (*ḍarūrah*), which is a different matter altogether and governed by a different set of rules.⁴⁴ It thus appears that this view only validates the type of *maṣlaḥah* that is referred to as *maṣlaḥah mu'tabarah*.

The opponents of *istiḥlāḥ* further add that to accept *istiḥlāḥ* as an independent proof of *Sharī'ah* would lead to disparity, even chaos, in the *ahkām*. The *ḥalāl* and *ḥarām* would be held to be applicable in some places or to some persons and not to others. This would not only violate the permanent and timeless validity of the *Sharī'ah* but would open the door to corruption.⁴⁵

As already stated, the *Hanafīs* and the *Shāfi'īs* do not accept *istiḥlāḥ* as an independent proof. Al-Shāfi'ī approves of *maṣlaḥah* only within the general scope of *qiyās*; whereas Abū Ḥanīfah validates it as a variety of *istiḥsān*. This would explain why the *Shāfi'īs* and the *Hanafīs* are both silent on the conditions of *maṣlaḥah*, as they treat the subject under *qiyās* and *istiḥsān* respectively. They have explained their position as follows: should there be an authority for *maṣlaḥah* in the *nuṣūṣ*, that is, if *maṣlaḥah* is one of the accredited *maṣāliḥ*, then it will automatically fall within the scope of *qiyās*. In the event where no such authority can be found in the *nuṣūṣ*, it is *maṣlaḥah malghā* and is of no account. But it would be incorrect to say that there is a category of *maṣlaḥah* beyond the scope of the *naṣṣ* and analogy to the

naṣṣ. To maintain that *maṣlahah mursalah* is a proof would amount to saying that the *nuṣūṣ* of the Qur'ān and the *Sunnah* are incomplete.⁴⁶ The opponents of *istiṣlāḥ* have further argued that the Lawgiver has validated certain *maṣāliḥ* and overruled others. In between there remains the *maṣlahah mursalah*, which belongs to neither. It is therefore equally open to the possibility of being regarded as valid (*mu'tabarah*) or invalid (*malghā*). Since there is no certainty as to its validity, no legislation may be based on it, for law must be founded in certainty, not doubt.

In response to this, it is argued that the Lawgiver has proscribed certain *maṣāliḥ* not because there is no benefit in them but mainly because of their conflict with other superior *maṣāliḥ*, or because they lead to greater evil. None of these considerations would apply to *maṣlahah mursalah*, for the benefit in it outweighs its possible harm. It should be borne in mind that the *maṣāliḥ* which the Lawgiver has expressly overruled (i.e. *maṣāliḥ malghā*) are few compared to those that are upheld. When we have a case of *maṣāliḥ mursalah* on which no clear authority may be found in the sources, and they appear to be beneficial, they are more likely to belong to the part that is more extensive and preponderant (*kathīr al-ghālib*), rather than to that which is limited and rare (*qalīl al-nādir*).⁴⁷

The Zāhirīs do not admit speculative evidence of any kind as a proof of *Sharī'ah*. They have invalidated even *qiyās*, let alone *maṣlahah*, on the grounds that *qiyās* partakes of speculation. The rules of *Sharī'ah* must be founded in certainty, and this is only true of the clear injunctions of the Qur'ān, *Sunnah* and *ijmā'*. Anything other than these is mere speculation, which should be avoided.⁴⁸ As for the reports that the Companions issued *fatuwās* on the basis of their own *ra'y* which might have partaken in *maṣlahah*, Ibn Ḥazm is categorical in saying that 'these reports do not bind anyone'.⁴⁹ Thus it would follow that the Zāhirīs do not accept *maṣlahah mursalah* which they consider to be founded in personal opinion (*ra'y*).⁵⁰

The Mālikīs and the Hanbalīs have, on the other hand, held that *maṣlahah mursalah* is authoritative and that all that is needed to validate action upon it is to fulfil the conditions that ensure its propriety. When these conditions are met, *maṣlahah* becomes an integral part of the objectives of the Lawgiver even in the absence of a particular *naṣṣ*. Ahmad ibn Hanbal and his disciples are known to have based many of their *fatuwās* on *maṣlahah*, which they have upheld as a proof of *Sharī'ah* and an instrument of protecting the faith, securing justice, and preventing *mafsadah*. They have thus validated the death penalty for

spies whose activity violates the *maṣlahah* of the Muslim community. The Hanbalīs have also validated, on grounds of *maṣlahah*, the death penalty for propagators of heresy when protecting the *maṣlahah* of the community requires this. But in all this, the Hanbalīs, like the Mālikīs, insist that the necessary conditions of *maṣlahah* must be fulfilled. *Maṣlahah* must pursue the valid objectives of the *Sharī'ah* and the dictates of sound intellect, acting upon which fulfils a useful purpose, or serves to prevent harm to the people.⁵¹ Some of the more far-reaching instances of *maṣlahah* in the Mālikī doctrine may be summarised as follows: (1) Imam Mālik validated the pledging of *bay'ah* (oath of allegiance) to the *mafdūl*, that is the lesser of the two qualified candidates for the office of the imam, so as to prevent disorder and chaos afflicting the life of the community.⁵² (2) When the Public Treasury (*bayt al-māl*) runs out of funds, the imam may levy additional taxes on the wealthy so as to meet the urgent needs of the government without which injustice and sedition (*fitnah*) may become rampant.⁵³ (3) In the event where all the means of earning a lawful living are made inaccessible to a Muslim, he is in a situation where he cannot escape to another place, and the only way for him to earn a living is to engage in unlawful occupations; he may do so but only to the extent that is necessary.⁵⁴

Conclusion

Despite their different approaches to *maṣlahah*, the leading 'ulamā' of the four Sunni schools are in agreement, in principle, that all genuine *maṣlahah* that do not conflict with the objectives (*maqāṣid*) of the Lawgiver must be upheld. This is the conclusion that both Khallāf and Abū Zahrah have drawn from their investigations.⁵⁵ The Shāfi'ī and Hanafī approach to *maṣlahah* is essentially the same as that of the Mālikī and Hanbalī schools, with the only difference being that the former have attempted to establish a common ground between *maṣlahah* and the *qiyās* that has an identifiable 'illah. Some Mālikī jurists, including Shihāb al-Dīn al-Qarāfī have observed that all the jurists are essentially in agreement on the concept and validity of *maṣlahah mursalah*. They only differ on points of procedure: while some would adopt it directly, others would do so by bringing the *maṣlahah* within the purview of *qiyās*.⁵⁶ But Imam Mālik's concept of *maṣlahah* is the most far-reaching of the four Sunni schools. Since *maṣlahah* must always be harmonious with the objectives of the Lawgiver, it is a norm by itself. *Maṣlahah mursalah* as such specifies the general ('ām)

of the Qur'an, just as the 'āmm of the Qur'an may be specified by *qiyās*. In the event of conflict between a genuine *maṣlaḥah* and a solitary *ḥadīth*, the former takes priority over the latter.⁵⁷

The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values that the Lawgiver has expressly decreed, the *Sharī'ah* would inevitably fall short of meeting the *maṣāliḥ* of the community. To close the door of *maṣlaḥah* would be tantamount to enforcing stagnation, and imposing unnecessary restrictions on the capacity of the *Sharī'ah* to accommodate social change. 'Abd al-Wahhāb Khallāf is right in his assessment that any claim to the effect that the *muṣṣaṣ* of the *Sharī'ah* are all-inclusive and cater for all eventualities is simply not true. The same author goes on to say: 'There is no doubt that some of the *maṣāliḥ* have neither been upheld nor indicated by the *Sharī'ah* in specific terms.'⁵⁸

As for the concern that the opponents of *maṣlaḥah mursalah* have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under the banner of *maṣlaḥah*, they only need to be reminded that a careful observance of the conditions that are attached to *maṣlaḥah* will ensure that only the genuine interests of the people that are in harmony with the objectives of the *Sharī'ah* would qualify. This concern is admittedly valid, but is one that cannot be confined to *maṣlaḥah* alone. Arbitrariness and the pursuit of self-seeking interests have never been totally eliminated in any society, under any legal system. It is a permanent threat that must be carefully checked and minimised to the extent that this is possible. But this very purpose will be defeated if legislation on grounds of *istiṣlāḥ* were to be denied validity. The attempt to combat the evil of arbitrary indulgence that shakes the banner of *maṣlaḥah* would surely have greater prospects of success if the *mujaḥid* and the imam were able to enact the necessary legislation on grounds of preventing harm to society. Consequently the argument that the opponents of *maṣlaḥah* have advanced would appear to be specious and self-defeating.

NOTES

1. Khallāf, 'Ilm, p. 84; Badrān, *Uṣūl*, p. 209.
2. Ghazālī, *Mustaḥṣā*, I, 139-40.
3. Badrān, *Uṣūl*, p. 210; Šābūnī, *Madkhal*, p. 131.
4. Khallāf, 'Ilm, p. 84.

5. Badrān, *Uṣūl*, p. 210; Šābūnī, *Madkhal*, p. 134.
6. Šāṭibī, *Muwāḍḡat*, II, 1-3; Šābūnī, *Madkhal*, p. 133.
7. Khallāf, 'Ilm, p. 84; Badrān, *Uṣūl*, p. 211.
8. Cf. Šāṭibī, *Muwāḍḡat*, II, 3; Muṣṭafā Zayd, *Maṣlaḥah*, p. 25.
9. Ibn Mājah, *Sunan*, *ḥadīth* no. 2340.
10. Khallāf, 'Ilm, p. 90; Abū Zahrah, *Uṣūl*, p. 222.
11. Muslim, *Sahih*, p. 411, *ḥadīth* no. 1546.
12. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 1020, *ḥadīth* no. 3587.
13. Ibn Qayyim, *Fāim*, II, 242; Muṣṭafā Zayd, *Maṣlaḥah*, p. 120.
14. Šāṭibī, *Fāim*, II, 287; Khallāf, 'Ilm, p. 86.
15. Ibn Qayyim, *Fāim*, I, 185; Abū Zahrah, *Uṣūl*, pp. 122-3; Muṣṭafā Zayd, *Maṣlaḥah*, p. 52.
16. Šāṭibī, *Fāim*, II, 292, 301; Ibn Qayyim, *Fāim*, I, 182; Abū Zahrah, *Uṣūl*, p. 223.
17. Šāṭibī, *Fāim*, II, 293; Khallāf, 'Ilm, p. 86; Abū Zahrah, *Uṣūl*, p. 223.
18. Ibn Qayyim, *Tunūq*, p. 16.
19. Šāṭibī, *Fāim*, II, 282-7; Abū Zahrah, *Uṣūl*, p. 223.
20. Šāṭibī, *Muwāḍḡat*, II, 3-5; Badrān, *Uṣūl*, p. 208.
21. Šāṭibī, *Muwāḍḡat*, II, 5; Muṣṭafā Zayd, *Maṣlaḥah*, pp. 54-5.
22. Šāṭibī, *Muwāḍḡat*, II, 27ff.
23. Khallāf, 'Ilm, p. 84; Badrān, *Uṣūl*, pp. 209-10.
24. Khallāf, 'Ilm, p. 85; Badrān, *Uṣūl*, p. 215.
25. Badrān, *Uṣūl*, p. 209.
26. Khallāf, 'Ilm, p. 86.
27. Abū Zahrah, *Uṣūl*, p. 220.
28. Khallāf, 'Ilm, p. 87; Badrān, *Uṣūl*, p. 214.
29. Abū Zahrah, *Uṣūl*, p. 219; Badrān, *Uṣūl*, p. 215.
30. Šāṭibī, *Fāim*, II, 307-14; Muṣṭafā Zayd, *Maṣlaḥah*, p. 51.
31. Ghazālī, *Mustaḥṣā*, I, 141.
32. Badrān, *Uṣūl*, pp. 215-16.
33. Tūfī, *Maṣāliḥ*, p. 139.
34. Ibid., p. 141; Muṣṭafā Zayd, *Maṣlaḥah*, pp. 238-240. This book is entirely devoted to an exposition of Tūfī's doctrine of *maṣlaḥah*.
35. Cf. Muṣṭafā Zayd, *Maṣlaḥah*, p. 121; Abū Zahrah, *Uṣūl*, p. 223. A discussion of Tūfī's doctrine can also be found in Kerr, *Islamic Reform*, pp. 97ff.
36. Tūfī, *Maṣāliḥ*, p. 141; Muṣṭafā Zayd, *Maṣlaḥah*, p. 131-2.
37. Mahmassānī, *Falaḡah al-Tashrīf*, p. 117. This author also quotes Shaykh Muṣṭafā al-Ghalaymī in support of his own view.
38. Cf. Šābūnī, *Madkhal*, pp. 134-5.
39. Cf. Badrān, *Uṣūl*, pp. 216-17; Šābūnī, *Madkhal*, p. 135.
40. Khallāf, 'Ilm, p. 88; Badrān, *Uṣūl*, p. 213.
41. Abū Zahrah, *Uṣūl*, pp. 221, 224; Khallāf, 'Ilm, p. 88; Badrān, *Uṣūl*, p. 213.
42. Ghazālī, *Mustaḥṣā*, I, 138.
43. Ibid., I, 139-40.
44. Cf. Badrān, *Uṣūl*, p. 211.
45. Khallāf, 'Ilm, p. 88.
46. Abū Zahrah, *Uṣūl*, p. 222; Muṣṭafā Zayd, *Maṣlaḥah*, p. 61; Badrān, *Uṣūl*, p. 213.

47. Badrān, *Uṣūl*, p. 214.
48. Ibn Hāzmi, *Ihkām*, V, 55–56.
49. *Ibid.*, VI, 40.
50. Cf. Muṣṭafā Zayd, *Maṣlaḥah*, p. 62.
51. *Ibid.*, p. 60.
52. Shāṭibi, *Iṣṣām*, II, 303.
53. *Ibid.*, II, 295.
54. *Ibid.*, II, 300.
55. Abū Zahrah, *Uṣūl*, p. 224; Khallāf, *Ilm*, p. 85.
56. Qarāfī, *Furūq*, II, 188; Abū Zahrah, *Uṣūl*, p. 225.
57. Abū Zahrah, *Uṣūl*, p. 225.
58. Khallāf, *Ilm*, p. 88.

CHAPTER FOURTEEN

‘Urf (Custom)

As a noun derived from its Arabic root ‘*anafa* (to know), ‘*urf*’ literally means ‘that which is known’. In its primary sense, it is the known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange. ‘*Urf*’ and ‘*ādah*’ are largely synonymous, and the majority of ‘*ulamā*’ have used them as such. Some observers have, however, distinguished the two, holding that ‘*ādah*’ means repetition or recurrent practice, and can be used with regard to both individuals and groups. We refer, for example, to the habits of individuals as their personal ‘*ādah*’. But ‘*urf*’ is not used in this capacity: we do not refer to the personal habits of individuals as their ‘*urf*’. It is the collective practice of a large number of people that is normally denoted by the word ‘*urf*’. The habits of a few or even a substantial minority within a group do not constitute ‘*urf*’.

‘*Urf*’ is defined as ‘recurring practices that are acceptable to people of sound nature’. This definition is clear on the point that custom, in order to constitute a valid basis for legal decisions, must be sound and reasonable. Hence recurring practices among some people in which there is no benefit or which partake of prejudice and corruption are excluded from the definition of ‘*urf*’.² ‘*Urf*’ and its derivative, *ma’nif*, occur in the Qur’ān, and it is the latter of the two that occurs more frequently. *Ma’nif*, which literally means ‘known’ is, in its Qur’ānic usage, equated with good, while its opposite, the *munkar* or ‘strange’, is equated with evil. It is mainly in this sense that ‘*urf*’ and *ma’nif* seem to have been used in the Qur’ān. The commentators have generally interpreted *ma’nif* in the Qur’ān as denoting faith in God and His Messenger, and adherence to God’s injunctions. Thus the standard

commentary on the Qur'ānic phrase *ta'murīna bi al-mā'nif wa tanhawna 'an al-munkar* (Āl 'Imrān, 3:110) given by the exegetes is that 'you enjoin belief in God and in His Messenger and enforce His laws, and you forbid disbelief and indulgence in the *harām*'.³ The same interpretation is given to the term '*urf*' in the text that occurs in *sūra al-A'rāf* (7:199): 'Keep to forgiveness, enjoin '*urf*' and turn away from the ignorant.'

خذ العفو وأمر بالعرف وأعرض عن الجاهلین

According to the exegetes, '*urf*' in this context means fear of God and the observance of His commands and prohibitions. But occasionally, *mā'nif* in the Qur'ān occurs in the sense of good conduct, kindness and justice, especially when the term is applied to a particular situation. It is only when '*urf*' or *mā'nif* is ordered generally without reference to a particular matter, situation or problem that it carries the meaning of adhering to God's injunctions. The reason for the position taken by the exegetes becomes apparent if one bears in mind Islam's perspective on good and evil (*husn wa-qubh*) which are, in principle, determined by divine revelation. Thus when God ordered the promotion of *mā'nif*, He could not have meant the good that reason or custom decrees to be such, but what He enjoins.⁴ This would also explain why '*urf*' in the sense of custom is not given prominence in the legal theory of the *usūl al-fiqh*, although it carries some authority, as we shall presently explain.

Custom that does not contravene the principles of *Sharī'ah* is valid and authoritative; it must be observed and upheld by a court of law. According to a legal maxim recorded by the Shāfi'i jurist al-Suyūṭī in his well-known work, *al-Ashbāh wa al-Nazā'ir*, 'what is proven by '*urf*' is like that which is proven by a *sharī'ī* proof'. This legal maxim is also recorded by the Hanafi jurist al-Sarakhsī, and was subsequently adopted in the Ottoman *Mujallah* which provides that custom, whether general or specific, is enforceable and constitutes a basis for judicial decisions.⁵ The *Mujallah* has recorded a number of legal maxims on '*urf*', which include the following:

Custom is a proof (Art. 36)

العادة محكمة

The usage of people is a proof that must be acted upon (Art. 37)

إستعمال الناس حجة يجب العمل بها.

What is accepted by '*urf*' is like a stipulated condition (Art. 33)

للمعروف عرفا كالمشروط شرطاً.

'Urf among the merchants is like a stipulated condition between them (Art. 44)

المعروف بين التجار كالمشروط بينهم.

The '*ulamā*' have generally accepted '*urf*' as a valid criterion for the purposes of interpreting the Qur'ān. To give an example, the Qur'ānic commentators have referred to '*urf*' in determining the precise amount of maintenance a husband must provide for his wife. This is the subject of *sūra al-Talāq* (65:7) which provides: 'Let those who possess means pay according to their means.'

لينفق ذو سعة من سعته

In this *āyah*, the Qur'ān does not specify the exact amount of maintenance, which is to be determined by reference to custom. Similarly, in regard to the maintenance of children, the Qur'ān only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom (*bi'l-mā'nif*) (al-Baqarah, 2:233). The *Sharī'ah* has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to *halāl* and *harām*. This is in turn reflected in the practice of the *fiqhahā*, who have adopted '*urf*', whether general or specific, as a valid criterion in the determination of the *ahkām* of *Sharī'ah*.⁶ The rules of *fiqh* that are based in juristic opinion (*ra'y*) or in speculative analogy and *ijtihad* have often been formulated in the light of prevailing custom; it is therefore permissible to depart from them if the custom on which they were founded changes in the course of time. The *ijtihadī* rules of *fiqh* are, for the most part, changeable with changes of time and circumstance. To deny social change due recognition in the determination of the rules of *fiqh* would amount to exposing the people to hardship, which the *Sharī'ah* forbids. Sometimes even the same *mujtahid* has changed his previous *ijtihad* with a view to bringing it into harmony with prevailing custom. It is well-known, for example, that Imam al-Shāfi'i laid the foundations of his school in Iraq, but that when he went to Egypt, he changed some of his earlier

views owing to the different customs he encountered in Egyptian society.⁷

Customs that were prevalent during the lifetime of the Prophet and were not expressly overruled by him are held to have received his tacit approval and have become part of what is known as *Sunnah taqrīriyyah*. Pre-Islamic Arabian custom which was thus approved by the Prophet was later upheld by the Companions, who often referred to it through statements such as 'We used to do such-and-such while the Prophet was alive'.⁸ Islam has thus retained many pre-Islamic Arabian customs while it has at the same time overruled the oppressive and corrupt practices of that society. Islam also attempted to amend and regulate some of the Arab customary laws with a view to bringing them into line with the principles of the *Sharī'ah*. The reverse of this is also true in the sense that pre-Islamic customs of Arabia influenced the *Sharī'ah* in its formative stages of development. Even in the area of the verbal and actual *Sunnah*, there are instances where Arabian custom has been upheld and incorporated within the *Sunnah* of the Prophet. An example of this is the rulings of the *Sunnah* concerning the liability of the kinsmen of an offender (i.e. the *‘āqilah*) for the payment of blood money, or *diyyah*. Similarly, the *Sunnah* that regulates certain transactions such as mortgage (*rahn*), advance sale (*salām*) and the requirement of equality (*kafā'ah*) in marriage have their roots in the pre-Islamic custom of the Arabs. There are also vestiges of pre-Islamic custom in the area of inheritance, such as the significance that the rules of inheritance attach to the male line of relationship, known as the *‘asabah*. As for the post-Islamic custom of Arabian society, Imam Mālik has gone so far as to equate the *‘amal ahl al-madinah*, that is the customary practice of the people of Medina, with *ijmā'*. This type of *‘amal* (lit. 'practice') constitutes a source of law in the absence of an explicit ruling in the Qur'ān and *Sunnah*. Custom has also found its way into the *Sharī'ah* through juristic preference (*istihsān*) and considerations of public interest (*maṣlahah*). And of course, *ijmā'* itself has to a large extent served as a vehicle for assimilating customary rules that were in harmony with the *Sharī'ah*, or were based in necessity (*darūrah*), into the general body of the *Sharī'ah*.⁹

I. The Conditions of Valid 'Urf

In addition to being reasonable and acceptable to people of sound nature, *urf*, in order to be authoritative, must fulfil the following requirements.

(1) *'Urf* must represent a common and recurrent phenomenon. The practice of a few individuals or of a limited number of people within a large community will not be authoritative, nor will a usage of this nature be upheld as the basis of a judicial decision in *Sharī'ah* courts. The substance of this condition is incorporated in the *Majallah al-Ahkām al-Adliyyah*, where it is provided that 'effect is only given to custom which is of regular occurrence' (Art. 14). To give an example, when a person buys a house or a car, the question as to what is to be included in either of these is largely determined by custom, if this is not otherwise specified in the terms of the agreement. More specifically, one would need to refer to the common practice among estate agents or car dealers respectively. But if no custom can be established as such, or there are disparate practices of various sorts, no custom can be said to exist and no judicial order may be based on it. Custom, in order to be upheld, must not only be consistent but also dominant in the sense that it is observed in all or most of the cases to which it could apply. If it is observed only in some cases but not in others, it is not authoritative. Similarly, if there are two distinct customary practices on one and the same matter, the one that is dominant is to be upheld. If, for example, a sale is concluded in a city where two or three currencies are commonly accepted and the contract in question does not specify any, the one that is the more dominant and common will be deemed to apply.¹⁰

(2) Custom must also be in existence at the time a transaction is concluded. In contracts and commercial transactions, effect is given only to customs which are prevalent at the time the transaction is concluded, and not to customs of subsequent origin. This condition is particularly relevant to the interpretation of documents, which are to be understood in the light of the custom that prevailed at the time they were written. Consequently, a rule of custom which is prevalent at the time the interpretation is attempted will not be relevant if it only became prevalent after the document was concluded. For it is generally assumed that documents which are not self-evident and require clarification can only convey concepts that were common at the time they were written.¹¹

(3) Custom must not contravene the clear stipulation of an agreement. The general rule is that contractual agreements prevail over custom, and recourse to custom is only valid in the absence of an agreement. Since contractual agreements are stronger than custom, should there arise a conflict between them it will normally be determined in favour of the former. If for example the prevailing custom

in regard to the provision of dower (*mahr*) in marriage requires the payment of one-half at the time of the conclusion of the contract and the remainder at a later date, but the contract clearly stipulates the prompt payment of the whole of the dower, the rule of custom will be of no account in the face of this stipulation. For custom is only to be invoked when no clear text can be found to determine the terms of a particular dispute; and whenever a clear text is in existence, recourse to custom will be out of the question. To give another example: the costs of formal registration in the sale of real property are customarily payable by the purchaser. But if there is a stipulation in the contract that specifically requires the vendor to bear those costs, then the custom will be of no account and the purchaser will not be required to pay the costs of registration.¹²

(4) Lastly, custom must not violate the *naṣṣ*, that is, the definitive principle of the law. The opposition of custom to *naṣṣ* may either be absolute or partial. If it is the former, there is no doubt that custom must be set aside. Examples of such conflicts are encountered in the Bedouin practice of disinheriting the female heirs, or the practice of usury (*ribā*) and wine-drinking. The fact that these are widely practised is of no consequence, as in each case there is a prohibitory *naṣṣ*, or a command that always takes priority, and no concession or allowance is made for the practice in question. But if the conflict between custom and text is not absolute in that the custom opposes only certain aspects of the text, then custom is allowed to act as a limiting factor on the text. The contract of *istiṣnāʾ*, that is, the order for the manufacture of goods at an agreed price, may serve as an example here. According to a *ḥadīth*, 'the Prophet prohibited the sale of non-existing objects but he permitted *salām* [i.e. advance sale in which the price is determined but delivery postponed]'.¹³

نَهَى عَنْ بَيْعِ مَا لَيْسَ عِنْدَ الْإِنْسَانِ وَرَخَّصَ فِي السَّلَمِ.

This *ḥadīth* is general in that it applies to all varieties of sale in which the object of sale is not present at the time of contract. *Salām* was exceptionally permitted as it was deemed to be of benefit to the people. The general prohibition in this *ḥadīth* would equally apply to *istiṣnāʾ* as in this case too the object of sale is non-existent at the time of contract. But since *istiṣnāʾ* was commonly practised among people of all ages, the *fuqahāʾ* have validated it on grounds of general custom. The conflict between *istiṣnāʾ* and the ruling of the *ḥadīth* is not absolute, because the *ḥadīth* has explicitly validated *salām*. If realisation

of benefit to the people was the main ground of the concession that has been granted in respect of *salām*, then *istiṣnāʾ* presents a similar case. Consequently, the custom concerning *istiṣnāʾ* is allowed to operate as a limiting factor on the textual ruling of the *ḥadīth* in that the *ḥadīth* is qualified by the custom concerning *istiṣnāʾ*.

Another example where a general text is qualified by custom is when a person is appointed to act as agent (*wakīl*) for another in respect of concluding a particular contract such as sale or marriage. The agent's power to conclude the contract, although not limited by the terms of his appointment, is nevertheless qualified by the prevalent custom. In the matter of sale, for example, the expected price that represents the fair market price will be upheld, and the currency of the locality will be accepted in exchange. According to a *ḥadīth*, the Prophet is said to have forbidden conditional sale, that is, sale with conditions that may not be in agreement with the nature of this contract. An example of this would be when A sells his car to B for 1,000 dollars on condition that B sells his house to A for 5,000 dollars. The *ḥadīth* quoted to this effect provides that the Prophet 'forbade sale coupled with a condition'.

إِنْ نَبِيٍّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - نَهَى عَنْ بَيْعٍ وَشَرْطٍ.

However, the majority of Hanafī and Malikī jurists have validated conditions that are accepted by the people at large and which represent standard custom. Here again the general prohibition is retained, but only conditions that are adopted by *ʿurf* are upheld; the general terms of the *ḥadīth* are, in other words, qualified by custom.¹⁴

It would be useful in this connection to distinguish *ʿurf* from *ijmāʿ*, for they have much in common with one another, which is why they are sometimes confused. But despite their similarities, there are substantial differences between *ʿurf* and *ijmāʿ* which may be summarised as follows:

(1) *ʿUrf* materialises by the agreement of all, or the majority of, the people, and its existence is not affected by the exception or disagreement of a few individuals. *Ijmāʿ*, on the other hand, requires for its conclusion the consensus of all the *mujtahidūn* of the period or the generation in which it materialises. Disagreement and dissension has no place in *ijmāʿ*, and any level of disagreement among the *mujtahidūn* invalidates *ijmāʿ*.

(2) Custom does not depend on the agreement of the *mujtahidūn*, but must be accepted by the majority of the people, including the

mujtahidūn. The laymen have, on the other hand, no say in *ijmā'* on juridical matters, which require only the participation of the learned members of the community.

(3) The rules of '*urf*' are changeable, and a custom may in the course of time give way to another custom or may simply disappear with a change of circumstance. But this is not the case with *ijmā'*. Once an *ijmā'* is concluded, it precludes fresh *ijtihād* on the same issue and is not open to abrogation or amendments. '*Urf* on the other hand leaves open the possibility of fresh *ijtihād*, and a ruling of *ijtihād* that is founded on '*urf*' may be changed even if the '*urf*' in which it originates does not.

(4) Lastly, '*urf*' requires an element of continuity in that it can only materialise if it exists over a period of time. *Ijmā'* can, on the other hand, come into existence whenever the *mujtahidūn* reach a unanimous agreement which, in principle, requires no continuity for its conclusion.¹⁵

II. Types of Custom

Custom is initially divided into two types, namely, verbal (*qawli*) and actual (*fi'li*). Verbal '*urf*' consists of the general agreement of the people on the usage and meaning of words deployed for purposes other than their literal meaning. As a result of such agreement, the customary meaning tends to become dominant and the original or literal meaning is reduced to the status of an exception. There are many examples in the Qur'an and *Sunnah* of words that have been used for a meaning other than their literal one, which were as a result commonly accepted by popular usage. Words such as *ṣalāh*, *zakāh* and *hajj* have been used in the Qur'an for purposes other than their literal meanings, and this usage eventually became dominant to the extent that the literal meaning of these words was consigned to obscurity. The verbal custom concerning the use of these words thus originated in the Qur'an and was subsequently accepted by popular custom. We also find instances of divergences between the literal and the customary meanings of words in the Qur'an where the literal meaning is applied regardless of the customary meaning. The word *walad*, for example, is used in the Qur'an in its literal sense, that is, 'offspring' whether a son or daughter (note *sūra al-Nisā'*, 4:11), but in its popular usage *walad* is used only for sons. Another example is *lahm*, that is, meat, which in its Qur'anic usage includes fish, but in its customary usage is applied only to meat other than fish. Whenever words of this nature, that is, words that have acquired a different

meaning in customary usage, occur in contracts, oaths and commercial transactions, their customary meaning will prevail. For example, when a person takes an oath that he will never 'set foot' in so-and-so's house, what is meant by this expression is the customary meaning, namely, actually entering the house. In this sense, the person will have broken the oath if he enters the house while never 'setting foot', such as by entering the house while mounted. But if he only technically sets his foot in the house without entering it, he will not be liable to expiation (*kaffārah*) for breaking his oath.¹⁶

Actual '*urf*' consists of commonly recurrent practices that are accepted by the people. An example of actual '*urf*' is the give-and-take sale, or *bay' al-ta'āfi*, which is normally concluded without utterances of offer and acceptance. Similarly, customary rules regarding the payment of dower in marriage may require a certain amount to be paid at the time of contract and the rest at a later date. The validity of this type of custom is endorsed by the legal maxim that reads: 'What is accepted by '*urf*' is tantamount to a stipulated agreement [*al-mā'nif 'urfan ka'l-mashrūt sharfan*']'. Consequently, actual '*urf*' is to be upheld and applied in the absence of an agreement to the contrary.

'*Urf*', whether actual or verbal, is once again divided into the two types of general and special: *al-'urf al-'āmm* and *al-'urf al-khāṣṣ* respectively. A general '*urf*' is one which is prevalent everywhere and on which the people agree regardless of the passage of time. A typical example of this is *bay' al-ta'āfi* to which reference has already been made. Similarly, the customary practice of charging a fixed price for entry to public baths is another example of general '*urf*', which is anomalous with the strict requirements of sale (as it entails consuming an unknown quantity of water) but the people have accepted it and it is therefore valid. It will be further noted that in their formulation of the doctrine of *istihsān*, the Hanafi jurists have validated departure from a ruling of *qiyās* in favour of general '*urf*'. This has already been elaborated in the chapter on *istihsān*.¹⁷

'Special custom' is '*urf*' that is prevalent in a particular locality, profession or trade. By its very nature, it is not a requirement of this type of '*urf*' that it be accepted by people everywhere. According to the preferred view of the Hanafi school, special '*urf*' does not qualify the general provisions of the *naṣṣ*, although some Hanafi jurists have held otherwise. Consequently, this type of '*urf*' is entirely ignored when it is found to be in conflict with the *naṣṣ*. The general rule to be stated here is that the *ahkām* of *Sharf*ah pertaining to the authority of '*urf*' only contemplate the provisions of general '*urf*'. A ruling of *qiyās*,

especially *qiyās* whose effective cause is not expressly stated in the *naṣṣ*, that is, *qiyās ghayr manṣūṣ al-ʿillāh*, may be abandoned in favour of a general 'urf, but will prevail if it conflicts with special 'urf. A number of prominent 'ulamā' have, however, given the *fatwā* that special 'urf should command the same authority as general 'urf in this respect. The reason why general 'urf is given priority over *qiyās* is that the former is indicative of the people's need, whose disregard may amount to an imposition of hardship on them. Some Hanafi jurists like Ibn al-Humām have taught that 'urf in this situation commands an authority equivalent to that of *ijmā'*, and that as such it must be given priority over *qiyās*. It is perhaps relevant here to add that Abū Hanīfah's disciple, al-Shaybānī, validated the sale of honeybees and silkworms as this was commonly practised during his time despite the analogical ruling that Abū Hanīfah had given against it on the grounds that they did not amount to a valuable commodity (*māl*). Furthermore, the 'ulamā' have recorded the view that since 'urf is given priority over *qiyās* in spite of the fact that *qiyās* originates in the *nuṣṣ* of the Qur'ān and *Sunnah*, it will *a fortiori* be preferred over considerations of public interest (*maṣlahah*) that are not rooted in the *nuṣṣ*. Having said this, however, it would seem that cases of conflict between general 'urf and *maṣlahah* would be rather rare. For 'urf by definition must be sound and reasonable, and these considerations tend to bring 'urf close to *maṣlahah*. For after all, 'urf and *maṣlahah*, each in their respective capacities, serve as a means for the realisation of public welfare and the prevention of hardship to people.

And lastly, from the viewpoint of its conformity or otherwise with the *Shari'ah*, custom is once again divided into the two types of approved or valid custom (*al-'urf al-ṣāḥih*) and disapproved custom (*al-'urf al-fāsid*). As is indicated in the terms of these expressions, the approved 'urf is one which is observed by the people at large without there being any indication in the *Shari'ah* that it contravenes any of its principles. The disapproved custom is also practised by the people but there is evidence to show that it is repugnant to the principles of *Shari'ah*. We have already referred to the Bedouin practice of disinheriting female relatives and the prevalence of *ribā'* which, although commonly practised, are both in clear violation of the *Shari'ah*, and as such represent examples of *al-'urf al-fāsid*.¹⁸

III. The Proof (*Hujjiyyah*) of 'Urf

Although the 'ulamā' have attempted to locate textual authority for 'urf in the Qur'ān, their attempt has not been free of difficulties. To

begin with, reference is usually made to the Qur'ānic text in sūra al-Hajj (22:78) which provides: 'God has not laid upon you any hardship in religion.'

وما جعل عليكم في الدين من حرج

This is obviously not a direct authority on the subject, but it is argued that ignoring the prevailing 'urf that does not conflict with the *nuṣṣ* of *Shari'ah* is likely to lead to inflicting hardship on the people, which must be avoided. The next *ayah* that is quoted in support of 'urf occurs in sūra al-A'rāf (7:199), but although this has a direct reference to 'urf, difficulties have been encountered in identifying it as its main authority. This *ayah*, to which a reference has already been made, enjoins the Prophet to 'keep to forgiveness, and enjoin 'urf, and turn away from the ignorant'.

خذ العفو وأمر بالعرف وأعرض عن الجاهلین

According to the Māliki jurist Shihāb al-Dīn al-Qarāfī, this *ayah* is explicit and provides a clear authority for 'urf. According to this view, 'urf is clearly upheld in the Qur'ān as a proof of *Shari'ah* and is an integral part of it.¹⁹ The generality of 'ulamā', however, maintain the view that the reference to 'urf in this *ayah* is to the literal meaning of the word, that is, to the familiar and good, and not to custom as such. But then it is added, bearing in mind that approved custom is normally upheld by people of sound nature and intellect, that the Qur'ānic concept of 'urf comes close to the technical meaning of this word. The literal or the Qur'ānic meaning of 'urf, in other words, corroborates its technical meaning and the two usages of the word are in essential harmony with one another. The commentators, however, further add that since the word 'urf in this *ayah* can mean many things, including 'profession of the faith', 'that which the people consider good', and of course 'that which is familiar and known', as well as 'urf in the sense of custom, it cannot be quoted as a textual authority for custom as such.²⁰ Among the indirect evidence in support of 'urf, the 'ulamā' have also quoted the following saying of the prominent Companion, 'Abd Allāh ibn Mas'ūd, that 'what the Muslims deem to be good is good in the sight of God'.

ما رآه المسلمون حسنا فهو حسن عند الله.

Although many scholars have considered this to be a *ḥadīth* from the Prophet, it is more likely, as al-Shāṭibī points out, to be a saying of 'Abd Allāh ibn Mas'ūd.²¹ The critics have, however, suggested that this *ḥadīth* refers to the approval of 'al-muslimūn', that is, all the Muslims, whereas 'urf varies from place to place, and the approval of all Muslims in its favour cannot be taken for granted. In response to this, it has been further suggested that 'muslimūn' in this context only denotes those among them who possess sound intellect and judgement, and not necessarily every individual member of the Muslim community.²²

The upshot of this whole debate over the authoritativeness of 'urf seems to be that, notwithstanding the significant role it has played in the development of the *Shari'ah*, it is not an independent proof in its own right. The reluctance of the 'ulamā' to recognise 'urf as a proof has been partly due to the circumstantial character of the principle, in that it is changeable upon changes of conditions of time and place. This would mean that the rules of *fiqh* that have at one time been formulated in the light of the prevailing custom would be liable to change when the same custom is no longer prevalent. The different *fatwās* that the later 'ulamā' of different schools have occasionally given in opposition to those of their predecessors on the same issues are reflective of the change of custom on which the *fatwā* was founded in the first place. In addition, since custom is basically unstable, it is often difficult to ascertain its precise terms. These terms may not be self-evident, and the frequent absence of written records and documents might add to the difficulty of verification.²³

The issue has perhaps become even more complex in modern times. Owing to a variety of new factors, modern societies have experienced a disintegration of their traditional patterns of social organisation. The accelerated pace of social change in modern times is likely to further undermine the stability of social customs and organisations. The increased mobility of the individual in terms of socio-economic status, massive urbanisation, the unprecedented shift of populations to major urban centres, and so forth, tend to interfere with the stability and continuity of 'urf.

Another factor that merits attention in this context is the development of statutory legislation as an instrument of government in modern times. The attempt to codify the law into self-contained statutes has to some extent reduced the need to rely on social custom as the basis of decision-making. But even so, it would be far from accurate to say that custom has ceased to play an important role both

as a source of law and a basis of judicial decision-making. This is perhaps evident from the general reference to custom as a supplementary source of law in the civil codes of many Islamic countries of today. The typical style of reference to custom in such statutes appears to be that custom is authoritative in the absence of a provision in the statute concerning a particular dispute.

The *fuqahā'* of the later ages (*muta'akhkhirūn*) are on record as having changed the rulings of the earlier jurists that were based in custom, owing to subsequent changes in the custom itself. The examples given below will show that the jurists have on the whole accepted 'urf not only as a valid basis of *iftihād* but also as the key indicator of the need for legal reform:

(1) Under the rules of *fiqh*, a man who causes harm to another by giving him false information is not responsible for the damage he has caused. The rule of *fiqh* that applies to such cases is that the *mubāshir*, that is the one who acted directly, is responsible for the losses. However, owing to the spread of dishonesty and corruption, the later *fuqahā'* have validated a departure from this rule in favour of holding the false reporter responsible for the losses caused.²⁴

(2) According to Imam Abū Hanīfah, when the *qādi* personally trusts the reliability of a witness who testifies before him, there is no need for recourse to cross-examination or *tazkiyah*. This ruling is based on the *ḥadīth* stating that 'Muslims are 'udul [i.e. upright and trustworthy] in relationship to one another'.

المسلمون عدول لبعضهم على بعض.

Abū Hanīfah's ruling was obviously deemed appropriate for the time in which it was formulated. But the experiences of later times aroused concern about dishonesty and lying on the part of witnesses. It was consequently considered necessary to take precautions so as to prevent perjury, and the 'ulamā' reached the opinion that *tazkiyah* should be applied as a standard practice to all witnesses. Abū Hanīfah's disciples are reported to have given a *fatwā* in favour of making *tazkiyah* a regular judicial practice. Consequently, *tazkiyah* was held to be a condition for admitting the testimony of witnesses, and a ruling was formulated to the effect that no testimony without *tazkiyah* could constitute the basis of a court decision.²⁵

(3) According to the accepted rule of the Hanafī school, which is attributed to Abū Hanīfah himself, no-one was allowed to charge any fees for teaching the Qur'ān or the principles of the faith. For teach-

ing these subjects was held to be a form of worship ('ibādah) and no reward for it was to be expected from anyone other than God. But subsequent experience showed that some people were reluctant to teach the Qur'ān, and an incentive by way of remuneration was considered necessary in order to encourage the teaching of Islam. Consequently, the fuqahā' gave a *fatwā* in favour of charging fees for teaching the Qur'ān.²⁶

(4) Among the rules of *fiqh* that have tended to 'change with the change of custom', there is one concerning the determination of the age by which a missing person (*mafqud*) is to be declared dead. According to the generally accepted view, the missing person must not be declared dead until he reaches the age at which his contemporaries would normally be expected to die. Consequently the jurists of the Hanafī school have variously determined this age at seventy, ninety and one hundred, and their respective rulings have taken into consideration the changes of experience and conditions that prevailed at the time the new rulings were formulated.²⁷

(5) And lastly, in the area of transactions, the concept of *al-ghabn al-fāhish*, that is radical discrepancy between the market price of a commodity and the actual price charged to the customer, is determined with reference to 'urf. To ascertain what margin of discrepancy in a particular transaction amounts to *al-ghabn al-fāhish* is determined by reference to the practice among tradesmen and people who are engaged in similar transactions. Since these practices are liable to change, the changes are in turn reflected in the determination of what might amount to *al-ghabn al-fāhish*.²⁸

NOTES

1. Badrān, *Uṣūl*, p. 224; Ziadeh, 'Urf and Law', p. 60; Ismā'īl, *Adillah*, p. 389.
2. Mahmassānī, *Falsafah* (Ziadeh's trans.), p. 132; Ismā'īl, *Adillah*, p. 388; Badrān, *Uṣūl*, p. 224.
3. Tabarī, *Tafsīr*, (Bölük 1323-29), IV, 30; Ziadeh, 'Urf and Law', pp. 60-61; Ismā'īl, *Adillah*, p. 401.
4. Cf. Ziadeh, 'Urf and Law', p. 62.
5. The *Mejelle* (Tyser's trans.), art. 36; Abū Zahrah, *Uṣūl*, p. 216; Mahmassānī, *Falsafah*, p. 131.
6. Šābūnī, *Madkhal*, p. 138; Ismā'īl, *Adillah*, p. 403.
7. Abū Zahrah, *Uṣūl*, p. 217; Aghnides, *Muhammadian Theories*, p. 82.
8. Ziadeh, 'Urf and Law', p. 62; Abdul Rahim, *Jurisprudence*, p. 137; Mahmassānī, *Falsafah*, p. 132.

9. Mahmassānī, *Falsafah*, p. 132; Šābūnī, *Madkhal*, p. 143; Badrān, *Uṣūl*, p. 242.
10. Mahmassānī, *Falsafah*, pp. 133-4; Šābūnī, *Madkhal*, pp. 139-140; Ismā'īl, *Adillah*, pp. 398-9.
11. Mahmassānī, *Falsafah*, p. 134; Šābūnī, *Madkhal*, p. 143.
12. Ismā'īl, *Adillah*, p. 400.
13. Bukhārī, *Ṣaḥīḥ*, III, 44 (*Kitāb al-Salam*, *ḥadīth* nos. 1-3); Badrān, *Uṣūl*, p. 121.
14. Shawkānī, *Irshād*, p. 161; Abū Zahrah, *Uṣūl*, p. 217; Badrān, *Uṣūl*, p. 230.
15. Badrān, *Uṣūl*, p. 225; Ismā'īl, *Adillah*, p. 291.
16. Ismā'īl, *Adillah*, pp. 392-3; Šābūnī, *Madkhal*, p. 137; Badrān, *Uṣūl*, p. 226.
17. Abū Zahrah, *Uṣūl*, p. 217; Šābūnī, *Madkhal*, p. 138; Aghnides, *Muhammadian Theories*, p. 81.
18. Badrān, *Uṣūl*, p. 231; Ismā'īl, *Adillah*, p. 393.
19. Qarāfī, *Furūq*, II, 85; Šābūnī, *Madkhal*, p. 143; Badrān, *Uṣūl*, p. 226.
20. Tabarī, *Tafsīr*, IV, 30; Ismā'īl, *Adillah*, pp. 401-402; Ziadeh, 'Urf and Law', pp. 61-2.
21. Šābūnī, *Fīṣām*, II, 319. Mahmassānī (*Falsafah*, p. 77) has also reached the conclusion that this is the saying of 'Abd Allāh ibn Mas'ūd, but Ārnidi (*Iḥkām*, I, 214) has quoted it as a *ḥadīth*.
22. Cf. Ismā'īl, *Adillah*, p. 402.
23. Cf. Badrān, *Uṣūl*, p. 233.
24. Abū Zahrah, *Uṣūl*, p. 218.
25. Bayhaqī, *al-Sunan al-Kubrā*, X, 155-6; Abū Zahrah, *Uṣūl*, p. 219; Šābūnī, *Madkhal*, pp. 144-5.
26. Abū Zahrah, *Uṣūl*, p. 219.
27. Šābūnī, *Madkhal*, p. 145.
28. Ibid.

CHAPTER FIFTEEN

Istishāb (Presumption of Continuity)

Literally, *istishāb* means 'escorting' or 'companionship'. Technically, *istishāb* denotes a rational proof that may be employed in the absence of other indications; specifically, those facts or rules of law and reason, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.¹ The technical meaning of *istishāb* relates to its literal meaning in the sense that the past 'accompanies' the present without any interruption or change. *Istishāb* is validated by the Shāfi'i school, the Ḥanbalis, the Zāhirīs and the Shi'ah Imamiyyah, but the Ḥanafīs, the Mālikīs and the *mutakallimūn*, including Abū al-Husayn al-Baṣrī, do not consider it a proof in its own right. The opponents of *istishāb* are of the view that establishing the existence of a fact in the past is no proof of its continued existence. The continued existence of the original state is still in need of proof in the same way as the claim that seeks to establish that the original condition has changed.²

For the Shāfi'is and the Ḥanbalis, *istishāb* denotes 'continuation of that which is proven and negation of that which had not existed'. *Istishāb*, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, *istishāb* requires, for example, that once a contract of sale (or of marriage for that matter) is concluded, it is presumed to remain in force until there is a change. Thus the ownership of the purchaser and the marital status of the spouses are presumed to continue until a transfer of ownership or dissolution of marriage can be established by evidence. Since both of these contracts are permanently valid under the *Sharī'ah* and do not admit of any time limits

it is reasonable to presume their continuity until there is evidence to the contrary. A mere possibility that the property in question might have been sold, or that the marriage might have been dissolved, is not enough to rebut the presumption of *istishāb*.³ However, if the law only validates a contract on a temporary basis, such as lease and hire (*ijārah*), then *istishāb* cannot presume its continuity on a permanent basis. The contract will continue to operate within the specified period and terminate when the period expires.

Istishāb also presumes the continuation of the negative. For example, A purchases a hunting dog from B with the proviso that it has been trained to hunt, but then A claims that the dog is untrained. A's claim will be acceptable under *istishāb* unless there is evidence to the contrary, for *istishāb* maintains the natural state of things, which in the case of animals is the absence of training.⁴

Presumption of continuity under *istishāb* is different from the continued validity of a rule of law in a particular case. The false accuser, for example, may never be admitted as a witness, a rule which is laid down in a clear Qur'ānic text (al-Nūr, 24:5). The permanent validity of the *ḥukm* in this case is established by the legal text, which is in no need of any presumption. *Istishāb* only applies when no other evidence is available, which is obviously not the case when there is a clear text that could be invoked.⁵

Since *istishāb* consists of a probability, namely the presumed continuity of the *status quo ante*, it is not a strong ground for the deduction of the rules of *Sharī'ah*. Hence when *istishāb* comes into conflict with another proof, the latter takes priority. As it is, *istishāb* is the last ground of *fatwā*: when the jurist is asked about the ruling of a particular case, he must first search for a solution in the Qur'ān, the *Sunnah*, consensus of opinion and *qiyās*. If a solution is still wanting, he may resort to *istishāb* in either its positive or negative capacities. Should there be doubt about the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven. Thus with regard to facts and situations that are known to have been present or absent in the past, *istishāb* presumes its non-existence until the claim is proven by evidence. But if someone claims that he has cleared and paid the debt he owed to another, *istishāb* will presume the opposite of the claim until evidence shows otherwise. In the case of a missing person, for example, the nature of the situation is such that no other proof of *Sharī'ah* could be employed to determine the question of his life or death. Since the main feature of the doubt concerning a missing person is the possi-

bility of his death, *istiḥāb* will presume that he is still alive. But in the event of an unsubstantiated claim, when for example A claims that B owes him a sum of money, the doubt here is concerned with the proof of the existence of a debt, which will be presumed that it is not proven.⁶

With regard to the determination of the rules of law that may be applicable to a particular issue, the presumption of *istiḥāb* is also guided by the general norms of the *Sharʿi* *ah*. The legal norm concerning foods, drinks and clothes, for example, is permissibility (*ibāḥah*). When a question arises as to the legality of a particular kind of beverage or food, and there is no other evidence to determine its value, recourse may be had to *istiḥāb*, which will presume that it is permissible. But when the norm in regard to something is prohibition, such as cohabitation between members of the opposite sex, the presumption will be one of prohibition, unless there is evidence to prove its legality.

Istiḥāb is supported by both *sharʿi* and rational (*ʿaqlī*) evidences. Reason tells us that in God's order of creation and in popular custom, it is normal to expect that pledges, contracts and laws will probably continue to remain operative until the contrary is established by evidence. It is equally normal to expect that things that had not existed will probably remain so until the contrary is proved. When reasonable men (*ʿuqalā*) and men who comply with the accepted norms of society (*ahl al-ʿurf*) have known of the existence or non-existence of something, as al-ʿAmīdī observes, from that point onwards they tend to formulate their judgements on the basis of what they know, until they are assured by their own observation or evidence that there is a change.⁷ Reason also tells us not to accept claims unsubstantiated by evidence that suggest a change in a *status quo* which is otherwise expected to continue. Hence a mere claim that a just person (*ʿādil*) has become a profligate (*fāsiq*) will be of no account, and the person will be presumed to be *ʿādil* until the contrary is established. Similarly, when a student is admitted and registered for a degree course, his status as a student remains unchanged until there is evidence to suggest that this is no longer the case. But until then there is no need for him to prove his status every week or every month.⁸

To presume the continuity of something that might have been present or absent in the past, as al-ʿAmīdī points out, is equivalent to a *ẓann*, which is valid evidence in juridical (*sharʿi*) matters, and action upon it is justified.⁹ The rules of *Sharʿi* *ah* continue to remain valid until there is a change in the law or in the subject to which it is

applied. The law, for example, has forbidden the consumption of wine, a ruling which will remain in force until there is a state of emergency or the wine loses its intoxicating quality, such as by being changed into vinegar.

I. Varieties of *Istiḥāb*

From the viewpoint of the nature of the conditions that are presumed to continue, *istiḥāb* is divided into four types as follows:

(1) Presumption of original absence (*istiḥāb al-ʿadam al-aqlī*), which means that a fact or rule of law that had not existed in the past is presumed to be non-existent until the contrary is proved. Thus a child and an uneducated person are presumed to remain so until there is a change in their status, for example by attaining majority or obtaining educational qualifications respectively. Similarly if A, who is a trading partner to B, claims that he has made no profit, the presumption of absence will be in A's favour unless B can prove otherwise. Another area that is determined by the presumption of original absence is the original freedom from liability, or the presumption of innocence, which will be separately discussed later.¹⁰

(2) Presumption of original presence (*istiḥāb al-uwjūd al-aqlī*). This variety of *istiḥāb* takes for granted the presence or existence of that which is indicated by the law or reason. For example, when A is known to be indebted to B, A is presumed such until it is proved that he has paid the debt or was acquitted of it. Provided that B's loan to A is proven in the first place as a fact, this is sufficient to give rise to the presumption of its continuity and B need not prove the continuity of the loan in question every day of the month. Similarly, under the presumption of original presence, the purchaser is presumed liable to pay the purchase price by virtue of the presence of the contract of sale until it is proved that he has paid it. By the same token, a husband is liable to pay his wife the dower (*mahr*) by virtue of the existence of a valid marriage contract. In all these instances, *istiḥāb* presumes the presence of a liability or a right until an indication to the contrary is found. The *ʿulamā* are in agreement on the validity of this type of *istiḥāb*, which must prevail until the contrary is proved.¹¹

(3) *Istiḥāb al-hukm*, or *istiḥāb* which presumes the continuity of the general rules and principles of the law. As earlier stated, *istiḥāb* is not only concerned with the presumption of facts but also with the established rules and principles of the law. *Istiḥāb* thus takes for granted the continued validity of the provisions of the *Sharʿi* *ah* in

regard to permissibility and prohibition (*halāl* and *harām*). When there is a ruling in the law, whether prohibitory or permissive, it will be presumed to continue until the contrary is proved. But when there is no such ruling available, recourse will be had to the principle of *ibāḥah*, which is the general norm of *Sharī'ah* law concerning a matter that is deemed beneficial and free of evil consequences. Hence when the law is silent on a matter and it is not repugnant to reason, it will be presumed to be permissible. This is the majority view, although some Mu'tazilah have held a variant opinion, which is that the general norm in *Sharī'ah* is prohibition unless there is an indication to the contrary. The principle of permissibility (*ibāḥah*) originates in the Qur'an, in particular those of its passages which subjugate the earth and its resources to the welfare of man. Thus we read in sūra al-Baqarah (2: 29): 'It is He who has created for you all that is in the earth'

هو الذي خلق لكم ما في الأرض جميعا

and in sūra al-Jāthiyah (45:13): 'God has subjugated to you all that is in the heavens and in the earth.'

وسخر لكم ما في السموات وما في الأرض

These Qur'ānic declarations take for granted that man should be able to utilise the resources of the world around him to his advantage, which is another way of saying that he is generally permitted to act in the direction of securing his benefits unless he has been expressly prohibited. Hence all objects, legal acts, contracts and exchange of goods and services that are beneficial to human beings are lawful on grounds of original *ibāḥah*.¹² But when the legal norm in regard to something is prohibition, then *istiḥāb* presumes its continuity until there is evidence to suggest that it is no longer prohibited.

(4) *Istiḥāb al-uṣaf*, or continuity of attributes, such as presuming clean water (purity being an attribute) to remain so until the contrary is established to be the case (for example through a change in its colour or taste). Similarly, when a person makes an ablution to perform the *ṣalāh*, the attribute of ritual purity (*ṭahārah*) is presumed to continue until it is vitiated. A mere doubt that it might have been vitiated is not sufficient to nullify *ṭahārah*. By the same token, a guarantor (*kaṣf al-kaṣālah* being a juridical attribute) remains responsible for the debt of which he is guarantor until he or the debtor pays it, or the creditor acquits him from payment.¹³

The jurists are in agreement on the validity, in principle, of the first three types of *istiḥāb*, although they have differed on their detailed implementation, as we shall presently discuss. As for the fourth type of *istiḥāb*, which relates to attributes, whether new or well-established, this is a subject on which the jurists have disagreed. The Shāfi'i and the Hanbali schools have upheld it absolutely, whereas the Hanafi and Mālikī schools accept it with reservations. The case of the missing person is discussed under this variety of *istiḥāb*, as the question is mainly concerned with the continuity of his life-life being the attribute. Since the missing person (*maḥqūd*) was alive at the time when he disappeared, he is presumed to be alive unless there is proof that he has died. He is therefore entitled, under the Shāfi'i and Hanbali doctrines, to inherit from a relative who dies while he is still a missing person. But no-one is entitled to inherit from him for the obvious reason that he is presumed alive. Yet under the Hanafi and Mālikī law, the missing person neither inherits from others nor can others inherit from him. The Hanafis and Mālikis accept *istiḥāb al-uṣaf* only as a means of defence, that is, to defend the continued existence of an attribute, but not as a means of proving new rights and new attributes. *Istiḥāb* cannot therefore be used as a means of acquiring new rights for the missing person, but can be used in order to protect all his existing rights. To use a common expression, *istiḥāb* can only be used as a shield, not as a sword. If, for example, the missing person had owned property at the time of his disappearance, he continues to be the owner. Similarly, his marital rights are presumed to continue, just as he remains responsible for discharging his obligations until his death is established by evidence or by a judicial decree. But as long as he remains a missing person, he will not be given a share in inheritance or bequest, although a share will be reserved for him until the facts of his life or death are established. If he is declared dead, the reserved share will be distributed among the other heirs on the assumption that he was dead at the time of the death of his relative. Upon declaration of his death his own estate will be distributed among his heirs as of the time the court declares him dead. This is the position under the Hanafi and Mālikī schools, which maintain that although the *maḥqūd* is presumed to be alive, this is only a presumption, not a fact, and may therefore not be used as a basis for the creation of new rights.¹⁴ The question may arise: why can his heirs not inherit from the *maḥqūd*? If nothing is certain, perhaps his heirs could be assigned their shares, or the shares may be reserved in their names until the facts are known. In response to this, the Hanafis invoke the principle of 'original absence',

which means here that a right to inheritance is originally absent and will be presumed so until there is positive proof that it has materialised.¹⁵

The Shafi'is and the Hanbalis have, on the other hand, validated *istiṣhāb* in both its defensive (*li-daf'*) and affirmative (*li-kasb*) capacities, that is, both as a shield and as a sword. Hence the *mafqūd* is presumed to be alive in the same way as he was at the time of his disappearance right up to the time when he is declared dead. The *mafqūd* is not only entitled to retain all his rights but can acquire new rights such as gifts, inheritance and bequests.¹⁶

It thus appears that the jurists are in disagreement, not necessarily on the principle, but on the detailed application of *istiṣhāb*. The Hanafis and Mālikis who accept *istiṣhāb* on a restricted basis have argued that the existence of something in the past cannot prove that it continues to exist. They have further pointed out that an over-reliance on *istiṣhāb* is likely to open the door to uncertainty, even conflict, in the determination of *ahkām*. The main area of juristic disagreement in this connection is the identification of what exactly the original state that is presumed to continue by means of *istiṣhāb* might be. This is a question that permeates the application of *istiṣhāb* in its various capacities, which is perhaps why the Hanbali scholar Ibn al-Qayyim al-Jawziyya is critical of over-reliance on *istiṣhāb* and of those who have employed it more extensively than they should.¹⁷ The following illustrations, which are given in the context of legal maxims that originate in *istiṣhāb*, also serve to show how the 'ulamā' have differed on the application of this doctrine to various issues. Some of the well-known legal maxims that are founded in *istiṣhāb* may be outlined as follows.

(1) Certainty may not be disproved by doubt (*al-yaqīn la yazūl bi'l-shakke*). For example, when someone is known to be sane, he will be presumed such until it is established that he has become insane. The presumption can only be set aside by certainty, not by a mere doubt. Similarly, when a person eats in the early morning during Ramaḍān while in doubt as to the time of dawn, his fast remains intact and no belated performance (*qadā'*) is necessary by way of compensation. To identify the two elements of the maxim under discussion, namely the certainty and doubt in this example, night represents certainty whereas daybreak is the state of doubt, and the former prevails over the latter. However, the same rule would lead us to a totally different result if it were applied to the situation of a person who ends his fast late in the day in Ramaḍān while in doubt as to the occurrence of sunset. In this case, his fast is vitiated and a belated performance would be

required in compensation. For the certainty that prevails here is the daytime, which is presumed to continue, while the onset of night is in doubt. To say that certainty prevails over doubt in this case means that the fast has been terminated during the day, which is held to be the prevailing state of certainty.¹⁸

To illustrate some of the difficulties that are encountered in the implementation of the maxim under discussion, we may give in example the case of a person who repudiates his wife by *talāq* but is in doubt as to the precise terms of his pronouncement: whether it amounted to a single or a triple *talāq*. According to the majority of jurists, only a single *talāq* takes place, which means that the husband is still entitled to revocation (*raf'ah*) and may resume normal marital relations. Imam Mālik has, on the other hand, held that a triple *talāq* takes place which would preclude the right to revocation. The difference between the majority opinion and that of Imam Mālik arises from the variant interpretations that they give to the question of certainty and doubt. The majority view presumes the marriage to be the state of certainty which would continue until its dissolution is established by evidence. The doubt in this case is the pronouncement of *talāq*. The doubtful *talāq*, according to the majority, may not be allowed to disprove a certain fact. The marriage is certain and the *talāq* is doubtful, hence the former is presumed to continue.

Imam Mālik, on the other hand, considers the occurrence of a divorce to be the certainty in this case. What is in doubt is the husband's right to the revocation of the *talāq*. As for determining the precise number of *talāqs*, which is crucial to the question of revocation, Imam Mālik holds that the right to revocation cannot be established by a mere doubt. Hence the husband has no right to revocation, which means that the divorce is final.¹⁹

While the majority of jurists consider marriage to be the certain factor in this case, for Imam Mālik it is the actual pronouncement of *talāq*, regardless of the form it might have taken, which represents the state of certainty and the basis on which *istiṣhāb* must operate. While commenting on these differences, both Ibn al-Qayyim al-Jawziyya and Abū Zahrah have considered the majority decision to be preferable. The marriage in this case must therefore not be allowed to be disproved by a doubtful *talāq*.²⁰

To give yet another example: when a man repudiates one of his two wives, but is not certain as to which one, according to the Mālikis the certain fact is that a *talāq* has been pronounced, while the uncertainty in this case is the identity of the divorcee. Both are

divorced on grounds of *istishāb*, which establishes that certainty must prevail over doubt. For the majority of 'ulamā', however, the certain fact is that the man has two wives, in other words, the existence of a valid marriage in respect of both. The doubt concerning the identity of the divorcee must not be allowed to disprove the state of certainty, namely the marriage. Hence neither of the two are divorced.²¹ Once again the juristic disagreement in this case arises from the different perception of the 'ulamā' in identifying the state of certainty on which the rules of *istishāb* must operate.

(2) Presumption of generality until the general is subjected to limitation is another maxim that originates in *istishāb*. The general ('*amm*') must therefore remain '*amm*' in its application until it is qualified in some way.

Just as a general text remains general until it is specified, so is the validity of that text, which is presumed to continue until it is abrogated. This would mean that a legal text remains valid and must be implemented as such unless it is abrogated or replaced by another text.²² While discussing the maxim under discussion, al-Shawkānī records the variant view held by some 'ulamā' to the effect that the rule of law in these situations is established through the interpretation of words and not by the application of *istishāb*.²³ To say that a text is general or specified, or that a text remains valid and has not been abrogated, is thus determined on grounds of interpretation of words and not by the application of *istishāb*. For example, the Qur'anic rule which assigns to the male a double share of the female in inheritance (al-Nisā', 4:11) is general and would have remained so if it were not qualified by the *ḥadīth* that 'the killer does not inherit'.²⁴

لا يرث القاتل

Similarly, the practical *Summah* concerning the direction of the *qiblah* remained in force until it was abrogated by the Qur'anic injunction in sūra al-Baqarah (2:144), which changed the *qiblah* from Jerusalem to the Ka'bah. This is all obvious so far, and perhaps al-Shawkānī is right in saying that there is no need for a recourse to *istishāb* in these cases. What *istishāb* might tell us in this context may be that in the event where there is doubt as to whether the general in the law has been qualified by some other enactment, or when there is doubt as to whether the law on a certain point has been abrogated or not, *istishāb* would presume the absence of specification and abrogation until the contrary is established by evidence.

(3) Presumption of original freedom from liability (*barā'ah al-dhimmah al-asliyyah*), which means freedom from obligations until the contrary is proved. No person may, therefore, be compelled to perform any obligation unless the law requires so. For example, no-one is required to perform the *hajj* pilgrimage more than once in his lifetime or to perform a sixth *ṣalāh* in one day, because the *Sharf'ah* imposes no such liability. Similarly, no one is liable to punishment until his guilt is established through lawful evidence.²⁵ However, the detailed implementation of this principle too has given rise to disagreement between the Shāfi'ī and Ḥanafī jurists. To give an example, A claims that B owes him fifty dollars and B denies it. The question may arise as to whether a settlement (*ṣulh*) after denial is lawful in this case. The Ḥanafīs have answered this in the affirmative, but the Shāfi'īs have held that a settlement after denial is not permissible. The Shāfi'īs argue that since prior to the settlement B denied the claim, the principle of original freedom from liability would thus apply to him, which means that he would bear no liability at all. As such it would be unlawful for A to take anything from B. The settlement is therefore null and void. The Ḥanafīs have argued, on the other hand, that B's non-liability after the claim is not inviolable. The claim, in other words, interferes with the operation of the principle under discussion. B can no longer be definitely held to be free of liability; this being so, a settlement is permissible in the interests of preventing hostility between the parties.²⁶

(4) Permissibility is the original state of things (*al-aṣl fī al-asḥyā' al-ibāḥah*). We have already discussed the principle of *ibāḥah*, which is a branch of the doctrine of *istishāb*. To recapitulate, all matters that the *Sharf'ah* has not regulated to the contrary remain permissible. They will be presumed so unless the contrary is proved to be the case. The one exception to the application of *ibāḥah* is relationships between members of the opposite sex, where the basic norm is prohibition unless it is legalised by marriage. The Ḥanbalīs have given *ibāḥah* greater prominence, in that they validate it as a basis of commitment (*iltizām*) unless there is a text to the contrary. Under the Ḥanbalī doctrine, the norm in '*ibādāt*' is that they are void (*bāṭil*) unless there is an explicit command to validate them. But the norm in regard to transactions and contracts is that they are valid unless there is a *naṣṣ* to the contrary.²⁷ To give an example, under the Ḥanbalī doctrine of *ibāḥah*, prospective spouses are at liberty to enter stipulations in their marriage contract, including a condition that the husband must remain monogamous. The Ḥanbalīs are alone in their ruling on this point,

as the majority of jurists have considered such a condition to amount to a superimposition on the legality of polygamy in the *Sharī'ah*. The provisions of the *Sharī'ah* must, according to the majority, not be circumvented in this way. The Lawgiver has permitted polygamy and it is not for the individual to overrule it. The Hanbalis have argued, on the other hand, that the objectives of the Lawgiver in regard to marriage are satisfied by monogamy. As it is, polygamy is a permissibility, not a requirement, and there is no *naṣṣ* to indicate that the spouses could not stipulate against it. The stipulation is therefore valid and the spouses are committed to abide by it.

Conclusion

Istishāb is not an independent proof or a method of juristic deduction in its own right, but mainly functions as a means of implementing an existing indication (*dalīl*) whose validity and continued relevance are established by the rules of *istishāb*. This might explain why the 'ulamā' have regarded *istishāb* as the last ground of *fatwā*, and one that does not command priority over other indications. The Mālikis have relied very little on it as they are known for their extensive reliance on other proofs, both revealed and rational, in the development of the rules of *Sharī'ah*; so much so that they have had little use for *istishāb*. This is also true of the Ḥanafī school of law, which has only rarely invoked *istishāb* as a ground for the determination of legal rules. *Istishāb* is applicable either in the absence of other proofs or as a means of establishing the relevance of applying an existing proof. It is interesting to note in this connection the fact that *istishāb* is more extensively applied by those who are particularly strict in their acceptance of other rational proofs. Thus we find that the opponents of *qiyās*, such as the Zāhirīs and the Akhbārī branch of the Shī'ah Imamiyyah, have relied on it most, and have determined the *ahkām* on its basis in almost all instances where the majority have applied *qiyās*. Similarly, the Shāfi'is, who reject *istishān*, have relied more frequently on *istishāb* than the Hanafīs and the Mālikis. In almost all cases where the Hanafīs and Mālikis have applied *istishān* or custom ('urf), the Shāfi'is have resorted to *istishāb*.²⁸

Istishāb is often described as a principle of evidence, as it is mainly concerned with the establishment or rebuttal of facts, and as such it is of greater relevance to the rules of evidence. The application of *istishāb* to penalties and to criminal law in general is to some extent restricted by the fact that these areas are mainly governed by the

definitive rules of *Sharī'ah* or statutory legislation. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence only. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of *istishāb* which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle of *ibāhah*, which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of *istishāb* is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition.

I shall end this chapter by summarising a reformist opinion concerning *istishāb*. In his booklet entitled *Tajdīd Uṣūl al-Fiqh al-Islāmī*, Ḥasan Turābī highlights the significance of *istishāb* and calls for a fresh approach to be taken to this doctrine. The author explains that *istishāb* has the potential to incorporate within its scope the concept of natural justice and the approved customs and mores of society.

According to Turābī, *istishāb* derives its basic validity from the belief that Islam did not aim at establishing a new life on earth in all of its dimensions and details, nor did it aim at nullifying and replacing all the mores and customs of Arabian society. The Prophet did not take an attitude of opposition to everything that he encountered, but accepted and allowed the bulk of the existing social values and sought to reverse or replace only those that were oppressive and unacceptable. We also find in the Qur'ān references to *amr bi al-'urf*, or acting in accordance with the prevailing custom, unless it has been specifically nullified or amended by the *Sharī'ah* of Islam. Similarly, when the Qur'ān calls for the implementation of justice, beneficence (*ihsān*) and fairness in the determination of disputes, it refers, among other things, to the basic principles of justice that are upheld by humanity at large and the good conscience of decent individuals. Life on earth is thus a cumulative construct of moral and religious teachings, aided and abetted by enlightened human nature, which seeks to rectify what it deems to be wrong, unjust and undesirable. The *Sharī'ah* has also left many things unregulated and, when this is the case, human action in regard to them may be guided by good conscience and the general teachings of divine revelation. This is the substance, as Turābī explains, of the juridical doctrine of *istishāb*. In its material part, *istishāb* declares permissibility to be the basic norm in *Sharī'ah*; that people are deemed to be free of liability unless the law has determined otherwise; and that human beings may utilise everything on the earth for their benefit

unless they are forbidden by the law. It thus appears that *istiḥāb*, as a proof of *Sharī'ah*, merits greater prominence and recognition than we find to be the case in the classical formulations of this doctrine.²⁹

NOTES

1. Shawkānī, *Ishād*, p. 237; Āmidī, *Iḥkām*, IV, 127; Ibn Qayyim, *Flām*, I, 294.
2. Shawkānī, *Ishād*, p. 237; Abū Zahrah, *Uṣūl*, p. 234; Mahmassānī, *Falsafah*, p. 95.
3. Ibn Qayyim, *Flām*, I, 294; Badrān, *Uṣūl*, p. 218; Abū Zahrah, *Uṣūl*, p. 234.
4. Badrān, *Uṣūl*, p. 218.
5. Ibid.
6. Shawkānī, *Ishād*, p. 237; Abū Zahrah, *Uṣūl*, p. 235.
7. Āmidī, *Iḥkām*, IV, 128; Badrān, *Uṣūl*, p. 121.
8. Cf. Abū Zahrah, *Uṣūl*, p. 235.
9. Āmidī, *Iḥkām*, IV, 127.
10. Shawkānī, *Ishād*, p. 238; Badrān, *Uṣūl*, p. 218; Abū Zahrah, *Uṣūl*, p. 236.
11. Khallāf, *Ilm*, p. 92.
12. Abū Zahrah, *Uṣūl*, p. 236; Khallāf, *Ilm*, p. 92; Badrān, *Uṣūl*, p. 219; Khudārī, *Uṣūl*, pp. 354-5.
13. Ibn Qayyim, *Flām*, I, 295; Badrān, *Uṣūl*, p. 219.
14. Shawkānī, *Ishād*, p. 238; Abū Zahrah, *Uṣūl*, p. 237; Badrān, *Uṣūl*, p. 223; Coulson, *Succession*, pp. 198ff.
15. Zuhayr, *Uṣūl*, IV, 180.
16. Shawkānī, *Ishād*, p. 137.
17. Ibn Qayyim, *Flām*, I, 294.
18. Badrān, *Uṣūl*, pp. 220-1.
19. Ibn Qayyim, *Flām*, I, 296; Abū Zahrah, *Uṣūl*, p. 238.
20. Ibid.
21. Abū Zahrah, *Uṣūl*, p. 239.
22. Khudārī, *Uṣūl*, p. 356; Mahmassānī, *Falsafah*, p. 90.
23. Shawkānī, *Ishād*, p. 238.
24. Ibn Mājāh, *Sunan*, II, 913, *ḥadīth* no. 2735; al-Dārimī, *Sunan* (*Kitāb al-Farā'id*), II, 384.
25. Shawkānī, *Ishād*, p. 238; Mahmassānī, *Falsafah*, p. 90. The principle of original freedom from liability appears in al-Suyūṭī's *Ashbāh wa al-Nazā'ir* and in the *Majallah al-Ahkām al-'Adliyyah* (Art. 8).
26. Zuhayr, *Uṣūl*, IV, 180-1.
27. Ibn Qayyim, *Flām*, I, 300.
28. Cf. Abū Zahrah, *Uṣūl*, p. 241.
29. Turābī, *Tajdīd*, pp. 27-8.

CHAPTER SIXTEEN

Sadd al-Dharā'i' (Blocking the Means)

Dharī'ah (pl. *dharā'i'*) is a word synonymous with *wasilah*, which signifies the means to obtaining a certain end, while *sadd* literally means 'blocking'. *Sadd al-dharā'i'* thus implies blocking the means to an expected end that is likely to materialise if the means towards it is not obstructed. Blocking the means must necessarily be understood to imply blocking the means to evil, not to something good. Although the literal meaning of *sadd al-dharā'i'* might suggest otherwise, in its juridical application, the concept of *sadd al-dharā'i'* also extends to 'opening the means to beneficence'. But as a doctrine of jurisprudence, it is the former meaning, that is, blocking the means to evil, that characterises *sadd al-dharā'i'*. The latter meaning of this expression is not particularly highlighted in the classical expositions of the doctrine, presumably because opening the means to beneficence is the true purpose and function of the *Sharī'ah* as a whole and as such is not peculiar to *sadd al-dharā'i'*.

When the means and the end are both directed toward beneficence and *maṣlaḥah*, and are not explicitly regulated by a clear injunction (*naṣṣ*), the matter is likely to fall within the ambit of *qiyās*, *maṣlaḥah*, or *istiḥāb*, etc. Similarly, when both the means and the end are directed towards evil, the issue is likely to be governed by the general rules of *Sharī'ah*, and a recourse to *sadd al-dharā'i'* would seem out of place. Based on this analysis, it appears that as a principle of jurisprudence, *sadd al-dharā'i'* applies when there is a discrepancy between the means and the end on the good-neutral-evil scale of values. A typical case for the application of *sadd al-dharā'i'* would thus arise when a lawful means is expected to lead to an unlawful result, or when a lawful means

that normally leads to a lawful result is used to procure an unlawful end.

Both the means and the end may be good or evil, physical or moral, and they may be visible or otherwise, and the two need not necessarily be present simultaneously. For example, *khalwah*, or illicit privacy between members of the opposite sexes, is unlawful because it constitutes a means to *zinā* whether or not it actually leads to it. All sexual overtures that are expected to lead to *zinā* are similarly forbidden by virtue of the certainty or likelihood that the conduct in question would lead to *zinā*. *Dharā'i'* may also consist of the omission of a certain conduct such as trade and commercial transactions during the time of the Friday congregational prayer. The means that obstruct the said prayer, in other words, must be blocked, that is, by abandoning trade at the specified time.

The whole concept of *sadd al-dharā'i'* is founded in the idea of preventing an evil before it actually materialises. It is therefore not always necessary that the result should actually take place. It is rather the objective expectation that a means is likely to lead to an evil result that renders the means in question unlawful even without the realisation of the expected result. This is the case in both the examples given above: *khalwah* is thus unlawful even without actually leading to *zinā*, and trading during the time of the Friday prayer is unlawful whether or not it actually hinders the latter. Furthermore, since *sadd al-dharā'i'* basically aims to prevent an evil before its occurrence, the question of the intention to procure a particular result cannot be a reliable basis for assessing the means that lead to that result. Abū Zahrah has aptly observed that the nature and value of the means is determined by looking at the purpose that it pursues, regardless of whether the latter is intended or otherwise. When a particular act is deemed to lead to a certain result, whether good or evil, it is held to be the means toward that end. The question of the intention of the perpetrator is, as such, not relevant to the objective determination of the value of the means. It is rather the expected result that determines the value of the means. If the result is expected to be good and praiseworthy, so will be the means towards it, and if it is expected to be blameworthy the same will apply to the means regardless of the intention of the perpetrator, or the actual realisation of the result itself. This is, for example, borne out by the Qur'anic text that forbids the Muslims from insulting idol-worshippers, notwithstanding the inherent enormity of idol-worshipping or the actual intention behind it. The text thus proceeds: 'And insult not the associators lest

they [in return] insult God out of spite and ignorance' (al-An'ām; 6:108).

ولا تسبوا الذين يدعون من دون الله فيسبوا الله عدوا بغير علم

The means to an evil is thus obstructed by putting a ban on insulting idol-worshippers, a conduct which might otherwise have been permissible and even praiseworthy, as it would mean denunciation of falsehood and firmness of faith on the part of the believer. Thus a means which is intrinsically praiseworthy leads to an evil result, and acquires the value of the latter. Furthermore, the prohibition in this example is founded on the likelihood that the associators will insult God as a result. It is, in other words, the expected result that is taken into account. Whether the latter actually materialises or not is beside the point: insulting the idols and their worshippers is thus forbidden regardless of the actual result that such conduct may lead to. Similarly, the intention to bring about a particular result is irrelevant to the prohibition under discussion. Insulting idol-worshippers is thus forbidden even when a Muslim does not intend to bring about the expected result, that is, an insult to God; his intention may be good or bad, in either case, insulting the idols and their worshippers is forbidden since it is, on an objective basis, most likely to provoke the expected result.¹

The doctrine of *sadd al-dharā'i'* accords with the basic objectives of the Lawgiver. Hence the general rule regarding the value of the means in relationship to the end is that the former acquires the value of the latter. Al-Shāṭibī has aptly observed that the Lawgiver has legalised certain forms of conduct and prohibited others in accordance with the benefit or harm that they lead to. When a particular act or form of conduct brings about a result that is contrary to the objectives of the Lawgiver, then the latter will be held to prevail over the former.² If the means, in other words, violate the basic purpose of the *Sharī'ah*, they must be blocked. The laws of *Sharī'ah* are for the most part distinguishable in regard to their objectives (*maqāṣid*) and the means that procure or obstruct those objectives. The means are generally viewed in the light of the ends they are expected to obtain, and it is logically the latter that prevail over the former in that the means follow their ends, not vice versa. Normally the means to *wājib* become *wājib* and the means to *harām* become *harām*. Means may at times lead to both a good and an evil, in which case if the evil (*mafsadah*) is either equal to or greater than the benefit (*maṣlahah*), the former will prevail over the latter. This is according to the general principle that

'preventing an evil takes priority over securing a benefit'.³ *Sadd al-dharā'i'* thus becomes a principle of jurisprudence and a method of deducing the juridical ruling (*ḥukm shar'i*) on a certain issue or type of conduct that may not have been regulated in the existing law but whose ruling can be deduced through the application of this principle.

In addition to the Qur'anic *āyah* (al-An'ām, 6:108) on the prohibition of insulting idols as referred to above, the 'ulamā' have quoted as an authority for *sadd al-dharā'i'* the Qur'anic passage in sūra al-Baqarah (2: 104), as follows: 'O believers! Address not the Prophet by the word *'rā'inā*, but address him respectfully and listen to him.'

يا أيها الذين آمنوا لا تقولوا راعنا وقولوا انظروا واسمعوا

The reason for this prohibition was that the word *'rā'inā*, being a homonym, had two meanings, one of which was 'please look at us' or 'attend to us', while with a slight twist the same word would mean 'our shepherd'. The Jews used to insult the Prophet with it, and in order to block the means to such abuse, the Muslims were forbidden from using that form of address for the Prophet despite their good intentions and the fact that the word under discussion was not inherently abusive.⁴

Authority is also found for the principle of *sadd al-dharā'i'* in the *Sunnah*, especially the ruling in which the Prophet forbade a creditor from taking a gift from his debtor lest it became a means to usury and the gift a substitute for *ribā*. The Prophet also forbade the killing of hypocrites (*al-munāfiqūn*) and people who were known to have betrayed the Muslim community during battles. It was feared that killing such people would become a means to evil, namely, of giving rise to a rumour that 'Muḥammad kills his own Companions',⁵ which would, in turn, provide the enemy with an excuse to undermine the unity of the Muslim community. Consequently the Prophet put a ban on killing the *munāfiqūn*. On a similar note, the Prophet suspended enforcement of the *ḥadd* penalty for theft during battles so as to avoid defection to enemy forces. It was for this reason, namely to block the means to an evil, that the army commanders were ordered not to enforce the prescribed penalties during military engagements.⁶

The leading Companions are also known to have entitled to inheritance the divorced woman whom her husband had irrevocably divorced during his death-illness (*marād al-mawt*) in order to exclude her from inheritance. This was forbidden by the Companions so that a divorce of this kind would not become a means to abuse. It is also

reported that during the time of the Caliph 'Umar ibn al-Khaṭṭāb, one of his officials, Ḥudhayfā, married a Jewish woman in al-Madā'in. The Caliph wrote to him saying that he should divorce her. Ḥudhayfā then asked the Caliph if the marriage was unlawful. To this the Caliph replied that it was not, but that his example might be followed by others who would be lured by the beauty of the women of *ahl al-dhimmah*. The Caliph thus forbade something that the Qur'an had declared lawful so as to block the means to an evil as he perceived it at the time. It might be interesting to add here that Ibn Qayyim al-Jawziyya records at least seventy-seven instances and rulings of the learned Companions and the subsequent generations of 'ulamā' in which they resorted to *sadd al-dharā'i'* so as to block the means that led to evil.⁷

The 'ulamā' are, however, in disagreement over the validity of *sadd al-dharā'i'*. The Ḥanafī and Shāfi'ī jurists do not recognise it as a principle of jurisprudence in its own right, on the grounds that the necessary ruling regarding the means can be derived by recourse to other principles such as *qiyās*, and the Ḥanafī doctrines of *istiḥsān* and '*urf*'. But the Mālikī and Hanbalī jurists have validated *sadd al-dharā'i'* as a proof of *Sharī'ah* in its own right. Despite the different approaches that the 'ulamā' have taken to this doctrine, the Mālikī jurist al-Shāṭibī has reached the conclusion that the 'ulamā' of various schools are essentially in agreement about the conceptual validity of *sadd al-dharā'i'* but have differed in its detailed application. Their differences relate mainly to the grounds that may be held to constitute the means to something else, and also to the extent to which the concept of *sadd al-dharā'i'* can be validly applied.⁸ Abū Zahrah has reached essentially the same conclusion by observing that the Shāfi'ī and Ḥanafī jurists are for the most part in agreement with their Mālikī and Hanbalī counterparts, and that they differ only in regard to some issues.⁹ The following classification of *sadd al-dharā'i'* may cast light on the consensus, as well as some of the areas in which the 'ulamā' are in disagreement, regarding the application of this doctrine. It is perhaps well to remember at this point that notwithstanding the application of *sadd al-dharā'i'* in respect of opening the means to beneficence (*maṣlahah*), it is usually the prevention of evil (*mafsadah*) that acquires greater prominence in the discussion of this principle.

From the viewpoint of the degree of probability or otherwise that a means is expected to lead to an evil end, the 'ulamā' of *uṣūl* have divided the *dharā'i'* into four types.

(1) Means that definitely lead to evil, such as digging a deep pit

next to the entrance to a public place that is not lit at night, so that anyone who enters the door is very likely to fall into it. Based on the near-certainty of the expected result of injuring others, the means that lead to that result are equally forbidden. The 'ulamā' of all schools are, in principle, unanimous on the prohibition of this type of *dharī'ah* and a consensus (*ijmā'*) is said to have been reached on this point.¹⁰ Having said this, however, it should be added that the jurists have envisaged two possible eventualities. Firstly, the *dharī'ah* may consist of an unlawful act of transgression in the first place, as was the case in the foregoing example, in which case the perpetrator is held to be responsible for any loss or damage that might be caused, as by digging a pit in a place where he has no right or authority to do so. Secondly, the *dharī'ah* may consist of an act that is basically lawful, in which case the 'ulamā' have disagreed about the question of responsibility. If, for example, someone digs a water well in his own house but so close to the wall of his neighbour that the wall collapses as a result, the act here is held to be basically lawful as it consists of the exercise of the right of ownership, which is said to be irreconcilable with the idea of liability for damages. According to a variant view, however, the perpetrator is liable for damages. This ruling draws support from the principle, already referred to, that preventing an evil takes priority over securing a benefit.¹¹

(2) The second type of means is that which is most likely (i.e. on the basis of *al-zann al-ghālib*) to lead to evil and is rarely, if ever, expected to lead to a benefit. An example of this would be selling weapons during warfare or selling grapes to a wine maker. Although al-Shāfi'ī has noted that these transactions are invalid according to the consensus (*ijmā'*) of the 'ulamā', both Abū Zahrah and Badrān have noted that it is only the Mālikī and Hanbalī 'ulamā' who have considered these transactions to be forbidden (*harām*), as they are most likely to lead to evil notwithstanding the absence of certain knowledge that this will always be the case. In their opinion, a dominant probability or *zann* is generally accepted as a valid basis for the *ahkām* of *Sharī'ah*. Consequently when there is a strong likelihood that certain means will lead to an evil, the means may be declared forbidden on the basis of this probability alone.¹²

(3) The third of the four types of means under discussion is that which frequently leads to evil, but in which there is no certainty, or even a dominant probability, that this will always be the case. An example of this would be a sale that is used as a means to procuring usury (*ribā'*). These types of sales, generally known as *buyū'* *al-ajāl*

(deferred sales), in which either the delivery of the object of sale, or the payment of its price, is deferred to a later date, would all tend to fall into this category of means. If, for example, A sells a garment for ten rials to B with the price being payable in six months' time, and A then buys the same garment from B for eight rials with the price being payable immediately, this transaction in effect amounts to a loan of eight rials to B on which he pays an interest of two rials after six months. There is a dominant probability that this sale will lead to *ribā'* although there is an element of uncertainty in that it might not, which is why the 'ulamā' have disagreed on the validity or otherwise of this type of transaction. Imam Mālik and Ahmad ibn Hanbal have held that the means which are likely to lead to usury are unlawful (*harām*) and must be obstructed. They have acknowledged the possibility that a deferred sale may not actually lead to *ribā'*; they also take cognizance of the basic norm in regard to sale, which is legality, and yet they have ruled, on grounds of caution (*iḥtiyāt*), that sales that are likely to lead to *ribā'* are unlawful. The mere possibility that *ribā'* may not actually materialise is of no account and, although sale is generally lawful, this basic legality is of no consequence if it is expected to procure an evil. Furthermore, preventing the latter must be given priority over any possible benefit that the sale in question might entail.

The Imams Abū Ḥanīfah and al-Shāfi'ī have, on the other hand, ruled that unless it definitely leads to evil, the basic legality of sale must be held to prevail. Sale is basically lawful in all its varieties, deferred or otherwise, and in the absence of either positive knowledge ('*ilm*') or of a dominant *zann* that a sale will lead to *ribā'*, a mere frequency of occurrence should not be allowed to override the original legality of sale. The preferred view, however, is that of the Mālikī and Hanbalī schools, for there is evidence in the *Sunnah* to the effect that original permissibility may be overruled in the face of a likelihood (or customary practice), even without definite evidence that it might open the way to evil.¹³

The 'ulamā' have similarly differed over the validity or otherwise of a marriage that is concluded with the intention of merely satisfying one's sexual desire without a life-long commitment. Imam Mālik considers this to be invalid (*bāṭil*), as acts, according to this view, are to be judged by the intention behind them, and since the norm in marriage is permanence, the absence of an intention to that effect vitiates the *nikāḥ*. The main thrust of this view is to prevent the likely abuse that the marriage in question is likely to lead to. Imam al-Shāfi'ī has on the other hand held that the *nikāḥ* is valid so long as there is

nothing in the contract to vitiate it. The *Shari'ah*, according to this view, cannot operate on the hidden intentions of people but only on tangible facts that are susceptible to proof. Whether the *nikāh* in this case is a means to abuse is a matter for the conscience of the individual, and not the positive application of the law.¹⁴ The difference here is one of perspective. Whereas the Shāfi'i and Hanafi view is based on the apparent validity of a contract, the Māliki and Hanbali view takes into consideration the objective of a contract and the necessary caution that must be taken in order to prevent an evil.¹⁵ The 'ulamā' are, on the other hand, all in agreement on the prohibition of illicit privacy (*khalwah*) which is founded in the likelihood, though not amounting to positive proof, that it might lead to adultery.¹⁶

Another, similar instance in which the jurists have invoked the principle of *sadd al-dharā'i'* is the ruling, disputed by some, that close relatives may neither act as witnesses nor as judges in each others' disputes. Likewise, a judge may not adjudicate a dispute on the basis of his personal knowledge of facts without the formal presentation of evidence, lest it lead to prejudice in favour or against one of the parties. The principle involved here is that such activities might constitute the means to an evil end, namely a miscarriage of justice, and are therefore to be avoided. The Hanafis on the other hand maintain, particularly in reference to adjudication on the basis of personal knowledge, that it is lawful. Some 'ulamā' have also held the view that testimony by a relative may in fact facilitate justice and may not lead to evil, especially if relations testify against each other, which is why the 'ulamā' of various schools have allowed the testimony of father or son, or of spouses, against one another, but not in favour.¹⁷ The jurists have thus disagreed about the application of *sadd al-dharā'i'* to particular issues and the extent to which it may be validly applied to different situations.

(4) The last of the four varieties of means are those that are rarely expected to lead to evil and are most likely to lead to a benefit. An example of this would be to dig a water well in a place where it is not likely to cause injury or harm to anyone, or speaking a word of truth to a tyrannical ruler, or growing certain varieties of fruits, such as grapes, on one's own property. In all of these, as in many other matters, there is a possibility that a *mafsadah* might be caused as a result. In the case of growing grapes, for example, it is possible that the fruit may be fermented into wine, but a mere possibility of this kind is overlooked in view of the stronger likelihood of the benefit that it would otherwise achieve. The 'ulamā' are generally in agree-

ment on the permissibility of this type of means. The basic norm in regard to acts and transactions that would fall into this category of means is permissibility, and no-one may be prevented from attempting them on account of the mere possibility that they may lead to a *mafsadah*. On a similar note, no-one may be prevented from giving testimony in judicial disputes, nor may anyone be obstructed from telling the truth to a tyrannical ruler because of a mere possibility that this might give rise to a *mafsadah*.¹⁸

The foregoing discussion of *sadd al-dharā'i'* has primarily been concerned with means that led to an unlawful end. There was, in other words, no attempt to change the *ḥarām* into *ḥalāl*: whenever there was a likelihood that a lawful means led to an unlawful end, the means itself became unlawful. But the application of *sadd al-dharā'i'* also covers the eventuality where a *ḥarām* may be turned into *ḥalāl* or *mubāh* if this is likely to prevent a greater evil. A lesser evil is, in other words, tolerated in order to prevent a greater one. To give an example: it is permissible to seek the release of Muslim prisoners of war in exchange for the payment of a monetary ransom. To give money to the warring enemy is basically unlawful as it adds strength to the enemy, which is generally harmful. But it is permitted here as it achieves the freedom of Muslim prisoners, which would in turn add to the strength of the Muslim forces. This ruling is based in the principle of *sadd al-dharā'i'*, and consists of opening, rather than blocking, the means to the desired benefit. On a similar note, it is permissible for the Muslim community to pay the enemy so as to prevent the latter from inflicting harm on the Muslims, but only when the Muslim community is otherwise powerless to defend itself. Furthermore, the 'ulamā' have generally held that giving bribes is permissible if this is the only way to prevent oppression, and the victim is otherwise unable to defend himself. To this the Hanbali and Māliki jurists have added the proviso that giving bribes is only permissible as a means of defending one's proven rights but not if the right in question is disputed.¹⁹

Notwithstanding the essential validity of *sadd al-dharā'i'* as a principle of *Shari'ah*, over-reliance on it is not recommended. The 'ulamā' have cautioned that an excessive use of this principle may render the lawful (*mubāh*) or even the praiseworthy (*mandūb*) and the obligatory (*wājib*) unlawful, which should not be encouraged. An example of this would be when an upright person refuses to take custody of the property of the orphan, or of *waqf* property, for the pious motive of avoiding the possibility of incurring a sin. A refusal of this nature would seem to over-emphasise the significance of the means that

might lead to evil. With regard to the guardianship of the property of orphans, the Qur'an offers some guidance in that it permits mixing their property with that of the guardian as a matter of trust, a conclusion that is drawn from the text where we read in a reference to the orphans: 'If you mix their affairs with yours, they are your brethren, but God knows the wrong-doer from the upright' (al-Baqarah, 2:220).

وإن تخالطوهم فأخوانكم والله يعلم المفسد من المصلح

While discussing the caution of the 'ulamā' against over-reliance on *sadd al-dharā'i'*, Abū Zahrah quotes the renowned Mālikī jurist Ibn al-'Arabī to the effect that the application of this principle should be regulated so as to ensure propriety and moderation in its use. Abū Zahrah then concurs with Ibn al-'Arabī to the effect that if an evil is to be prevented by blocking the means towards it, one must ascertain that the evil in question is *manṣūṣ 'alayh*, that is, one that has been ruled upon as such in the Qur'an or the *Sunnah*. Similarly, when a benefit is to be facilitated by opening the means to it, the propriety of the benefit must be sustainable by analogy with a *ḥalāl manṣūṣ* (that which has been declared lawful in the *naṣṣ*). But Abū Zahrah is careful to add that these conditions remain in the nature of an opinion and are not required in the accepted Mālikī exposition of this doctrine.³⁰

And finally, with regard to the guardianship of property and trust in the foregoing example, it is suggested that the harm that is likely to arise from the refusal of an upright person to undertake it is likely to be greater than that which might arise from undertaking it. If the orphans were to be neglected for fear of opening the means to misuse of trust, or if no-one gave testimony for fear of indulging in lying, then surely this would itself become a means to greater evil and should therefore be avoided.

We might end our discussion of *sadd al-dharā'i'* by distinguishing the means from the preliminary (*muqaddimah*), although the two can at times coincide and overlap. Briefly, a 'preliminary' consists of something that is necessary for obtaining the result that it aims for, in the sense that the latter cannot materialise without the former. For instance, ablution (*wuḍū'*) is a preliminary to *ṣalāh* and the latter cannot be performed without the former. But a means to something does not stand in the same relationship to its end. Although the means is normally expected to lead to the end it contemplates, the latter may also be obtained through some other means. The end, in other words, is not exclusively dependent on the means. To give an example: travelling

in order to commit theft is a preliminary to the theft that is aimed for but not a means to it. Travelling, which might consist of riding a train in a certain direction, is basically neutral and cannot, on an objective basis, be said to constitute a means to theft. But *taḥlīl*, that is an intervening marriage concluded in order to legalise remarriage between a divorced couple, is a means to the proposed marriage but not a preliminary to it, as the latter is not exclusively dependent on *taḥlīl* and can, for example, follow a normal intervening marriage. Similarly, seductive overtures between members of the opposite sexes are a means, but not a preliminary, to adultery, as the latter can materialise even without such overtures. Sexual overtures can only constitute a preliminary to *zinā* when they actually lead to it.

The other difference to note between the means and the preliminary for our purposes, is, as already indicated, that the former is usually evaluated and declared unlawful on an objective basis even without the realisation of its expected end. The preliminary to an act, on the other hand, is of little value without the actual occurrence of the act of which it becomes a part. The relationship between preliminary and its result is subjective in the sense that it can only be evaluated in the light of the completed or the intended result. Walking in the direction of a mosque to perform the Friday prayers, for example, can only acquire the value of the *uājib* if it actually leads to the performance of the prayers, not otherwise.³¹

It thus appears that *sadd al-dharā'i'* not only aims to block the means to evil but, in an affirmative sense, it is predicated on upholding the basic objectives (*maqāṣid*) of *Sharī'ah*, especially the *maṣlaḥah*. It is founded on the rationale that the laws of *Sharī'ah* aim to realise certain objectives just as they also seek to prevent corruption and evil. These are the basic goals of *Sharī'ah*, which must not be frustrated or overruled through a mere change of tactics or the adoption of plausible stratagems. When there is such a threat, *sadd al-dharā'i'* is one way by which the *ūlū al-amr* and the *mujtahid* may vindicate the basic objectives of the law by closing the door to manipulation and abuse. The fact that the Mālikī school became the chief exponent of this doctrine is due, to a large extent, to the parallel recognition by this school of *maṣlaḥah* as an independent source. The Mālikī doctrine of *sadd al-dharā'i'*, in other words, derived much of its rigour from the parallel emphasis that this *madhhab* has placed on *maṣlaḥah*. Since *sadd al-dharā'i'* is rooted in the realisation of genuine *maṣlaḥah*, the Mālikī school was able to give this doctrine a degree of prominence that the other schools were not in a position to give.

Notwithstanding the inherent strength of *sadd al-dharā'ī* in preventing manipulation and abuse, Abū Zahrah has warned against overreliance on it, for this is equally likely to lead to abuse in that one who indulges in *sadd al-dharā'ī* maybe inclined to impinge on the basic liberties of people and clamp down on what may be permissible (*mubāh*), recommended (*mandūb*) or even obligatory (*uājib*) for fear of preventing another abuse.²²

A brief note is also in order as to the distinction between legal stratagems (*al-hiyal*) and *sadd al-dharā'ī*. The main difference between these two is that a legal stratagem (*hiyalah*) is specifically intended, and it is usually utilised as a means of dodging the law by recourse to methods that may give the appearance of legality. The purpose is to circumvent the law by recourse to specious methods, such as avoiding the payment of *zakāh* by making a gift of one's property at the time the *zakāh* becomes payable. Giving a gift is lawful, but here it is used as a means of dodging the *zakāh*. The main differences between *sadd al-dharā'ī* and *hiyalah* may be summarised as follows. (1) Unlike the *sadd al-dharā'ī*, which normally blocks the way to an evil end, *hiyalah* opens the way to an evil end by circumventing the rules of *Sharī'ah*. Methods that are used to bring about a lawful result are thus not included in *hiyalah* but may well fall under *sadd al-dharā'ī*. (2) The role of the intention of the perpetrator is significant in *hiyalah*. The question of intention is, on the other hand, not a determinant factor in *sadd al-dharā'ī*. (3) *Sadd al-dharā'ī* is a wider concept than *hiyalah*, as there is a certain degree of objectivity and openness in the former that is lacking in the latter. *Hiyalah* is evaluated and determined in reference to the intention of its perpetrator, whereas *sadd al-dharā'ī* looks at the expected result and consequences of conduct on an objective basis. This element of objectivity tends to make *sadd al-dharā'ī* more susceptible to the prevailing customs and realities of society. Having said this, however, there may be cases in which the distinction between the two situations may not be clear and *hiyalah* and *dharā'ī* may consequently overlap.²³

NOTES

1. Cf. Abū Zahrah, *Uṣūl*, p. 228.
2. Shāṭibī, *Muwāfaqāt* (ed. Dirāz), IV, 194.
3. Ibid., IV, 195; Badrān, *Uṣūl*, p. 242.
4. Cf. Abū Zahrah, *Uṣūl*, p. 228; Ismā'īl, *Adillāh*, p. 197.

5. Shāṭibī, *Muwāfaqāt*, IV, 62; Shalabī, *Fiqh*, p. 187.
6. Abū Zahrah, *Uṣūl*, p. 219; Shalabī, *Fiqh*, p. 187; Ismā'īl, *Adillāh*, p. 200.
7. Ibn Qayyim, *I'lm*, III, 122ff; Shalabī, *Fiqh*, p. 188.
8. Shāṭibī, *Muwāfaqāt*, IV, 201.
9. Abū Zahrah, *Uṣūl*, pp. 227-8.
10. Abū Zahrah, *Uṣūl*, p. 228; Badrān, *Uṣūl*, p. 143.
11. Abū Zahrah, *Uṣūl*, p. 230; Badrān, *Uṣūl*, p. 243.
12. Abū Zahrah, *Uṣūl*, p. 231; Badrān, *Uṣūl*, p. 244.
13. Shāṭibī, *Muwāfaqāt*, IV, 200; Badrān, *Uṣūl*, p. 244; Abū Zahrah, *Uṣūl*, p. 232.
14. Ismā'īl, *Adillāh*, p. 175.
15. Abū Zahrah, *Uṣūl*, p. 231.
16. Badrān, *Uṣūl*, p. 245.
17. Shalabī, *Fiqh*, p. 186; Badrān, *Uṣūl*, p. 244; Ismā'īl, *Adillāh*, p. 211.
18. Shāṭibī, *Muwāfaqāt*, II, 249; Badrān, *Uṣūl*, p. 145; Abū Zahrah, *Uṣūl*, p. 230.
19. Abū Zahrah, *Uṣūl*, p. 232.
20. Ibid., p. 233.
21. Cf. Badrān, *Uṣūl*, pp. 245-6; Ismā'īl, *Adillāh*, p. 171.
22. Abū Zahrah, *Uṣūl*, p. 233.
23. Shāṭibī, *Muwāfaqāt*, IV, 201; Miqa, *al-Ra'y*, p. 455.

Hukm Shar'ī (Law or Value of Shar'īah)

Literally, *hukm* means 'to prove' or 'to eliminate something in respect of another'. For example, when it is said that this house belongs to A, it means that A's ownership is proven in respect of that house. It also means that ownership of that house by another person is nullified. A *hukm* can be rational ('aqli), such as $1+1=2$, or perceptible to the senses (hissi), or it can be shar'ī, such as the obligation to perform the five daily prayers. The 'ulamā' of uṣūl define *hukm shar'ī* as a locution or communication from the Lawgiver concerning the conduct of the *mukallaf* (person in full possession of his faculties) which consists of a demand, an option or an enactment. A demand (*talab* or *iqtidā'*) is usually communicated in the form of either a command or a prohibition. The former demands that the *mukallaf* do something, whereas the latter requires him to avoid doing something. A demand may either be binding, which leaves the *mukallaf* with no choice but to conform, or may not be binding. When a demand to do or not to do something is established by definitive proof (*dalīl qafī*), it is referred to as *wājib* or *ḥarām* respectively. Such is the majority view, but according to the Hanafī jurists, if the text that conveys such a demand is not definitive in its meaning (*dalālah*) or authenticity (*thubūt*), it is *wājib*; if it is definitive in both respects, it is *farḍ*. As for the demand to avoid doing something, the Hanafīs maintain that if it is based on definitive proof in terms of both meaning and authenticity, it is *ḥarām*, otherwise it is *makrūh tahrimi*. When a demand is not utterly emphatic and leaves the individual with an element of choice it is known as *mandūb*

(recommended). The option (*takhyīr*), on the other hand, is a variety of *hukm shar'ī* that leaves the individual at liberty either to do or avoid doing something. A *hukm* of this kind is commonly known as *mubāh* (permissible). An enactment, or *waḍ'*, is neither a demand nor an option, but an objective exposition of the law which enacts something as a cause (*sabab*) or a condition (*shart*) of obtaining something else; or it may be conveyed in the form of a hindrance (*māni'*) that might operate as an obstacle against obtaining it.¹

To give some examples, the Qur'ānic command that exhorts the believers to 'fulfil your contracts' (al-Mā'idah, 5:1)

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

is a speech of the Lawgiver addressed to the *mukallaf* that consists of a particular demand. A demand addressed to the *mukallaf* conveying a prohibition may be illustrated by reference to the Qur'ānic text which provides: 'O you believers, let not some people ridicule others, for it is possible that the latter are better than the former' (al-Hujurat, 49:11).

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرُ قَوْمٌ مِنْ قَوْمٍ عَسَىٰ
أَنْ يَكُونُوا خَيْرًا مِنْهُمْ

To illustrate a *hukm* that conveys an option, we refer to the Qur'ānic text that permits the believers to 'hunt when you have come out of the state of *iḥrām*' (the sacred state entered into for the purpose of performing the *hajj* pilgrimage) (al-Mā'idah, 5:2).

وَإِذَا حَلَلْتُمْ فَاصْطَادُوا

Another Qur'ānic text that consists of an option occurs in sūra al-Baqarah (2:229) which provides: 'If you fear that they [i.e. the spouses] would be unable to observe the limits set by God, then there would be no sin for either of them if she gives a consideration for her freedom.'

فَإِنْ خِفْتُمْ أَلَّا يَقِيْمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمْ فِيمَا افْتَدَتْ بِهِ

The married couple are thus given the choice to incur a divorce by mutual consent, known as *khul'*, if they so wish, but they are under

no obligation if they do not. Another form of option that occurs in the Qur'ān may be illustrated with reference to the expiation (*kaffārah*) of erroneous killing. The perpetrator has here been given the choice to either set a slave free, or feed sixty destitutes, or fast for two consecutive months (al-Nisā', 4:92). The following *hadith* also conveys a *hukm* in which the individual is given a choice. The *hadith* reads: 'If any of you sees something evil, he should set it right by his hand; if he is unable to do so, then by his tongue; and if he is unable to do even that, then within his heart – but this is the weakest form of faith.'²

من رأى منكم منكرا فليغيره بيده ، فإن لم يستطع فبلسانه ،
فإن لم يستطع فقلبه وذلك أضعف الإيمان .

Here the choice is given according to the ability of the *mukallaf* and the circumstances that might influence his decision. Lastly, to illustrate a *hukm* that consists of an enactment (*waḍ'*) we may refer to the *hadith* which provides that 'the killer does not inherit'.³

لا يرث القاتل .

This is a speech of the Lawgiver concerning the conduct of the *mukallaf* which is neither a demand nor an option but an objective ruling of the law that envisages a certain eventuality.

The 'ulamā' of *uṣūl* have differed with the *fuqahā'* in regard to the identification of *hukm shar'i*. To refer back to the first example where we quoted the Qur'ān concerning the fulfilment of contracts, according to the 'ulamā' of *uṣūl*, the text itself, that is, the demand that is conveyed in the text, represents the *hukm shar'i*. However, according to the *fuqahā'*, it is the effect of that demand, namely the obligation (*uṣṭūb*) that it conveys, which embodies the *hukm shar'i*. To give another example, the Qur'ānic prohibition that provides in an address to the believers: 'Do not commit adultery' (al-Isrā', 17:32)

ولا تقرّبوا الزنا

is itself the embodiment of the *hukm shar'i*, according to the 'ulamā' of *uṣūl*. But according to the *fuqahā'*, it is the effect of the demand in this *āyah*, namely the prohibition (*tahrim*) which represents the *hukm shar'i*. Similarly, the Qur'ānic text in respect of the permissibility of

hunting which we earlier quoted is itself the embodiment of the *hukm shar'i* according to the 'ulamā' of *uṣūl*, but it is the effect of that text, namely the permissibility (*ibāḥah*) that is the *hukm* according to the *fuqahā'*. Having explained this difference of perspective between the 'ulamā' of *uṣūl* and the *fuqahā'*, it will be noted, however, that it is of no practical consequence concerning the rulings of the *Shar'i*, in that the two aspects of *hukm* that they highlight are to all intents and purposes concurrent.⁴

Hukm shar'i is divided into the two main varieties of *al-hukm al-taklīfī* (defining law) and *al-hukm al-waḍ'ī* (declaratory law). The former consists of a demand or an option, whereas the latter consists of an enactment only. 'Defining law' is a fitting description of *al-hukm al-taklīfī*, as it mainly defines the extent of man's liberty of action. *Al-hukm al-waḍ'ī* is rendered 'declaratory law', as this type of *hukm* mainly declares the legal relationship between the cause (*sabab*) and its effect (*musabbab*), or between the condition (*sharṭ*) and its object (*mashrūṭ*).⁵ Defining law may thus be described as a locution or communication from the Lawgiver which demands the *mukallaf* to do something or forbids him from doing something, or gives him an option between the two. This type of *hukm* occurs in the well-known five categories of *wājib* (obligatory), *mandūb* (recommended), *ḥarām* (forbidden), *makrūh* (abominable) and *mubāḥ* (permissible). Declaratory law is also subdivided into the five categories of *sabab* (cause), *sharṭ* (condition), *mānī* (hindrance), *al-'azimah* (strict law) as opposed to *al-nukhsah* (concessionary law), and *ṣāliḥ* (valid) as opposed to *bāṭil* (null and void).⁶ We shall presently discuss the various sub-divisions of *hukm*.

I. Defining Law (*al-Hukm al-Taklīfī*)

As stated above, 'defining law' is a locution or communication from the Lawgiver addressed to the *mukallaf* which consists of a demand or of an option; it occurs in the five varieties of *wājib*, *mandūb*, *ḥarām*, *makrūh* and *mubāḥ*. We shall discuss each of these separately, as follows.

I.1 The Obligatory (*Wājib*, *Fard*)

For the majority of 'ulamā', *wājib* and *fard* are synonymous, and both convey an imperative and binding demand of the Lawgiver addressed to the *mukallaf* in respect of doing something. Acting upon something *wājib* leads to reward, while omitting it leads to punishment in

this world or in the hereafter. The Hanafis have, however, drawn a distinction between *wājib* and *fard*. An act is thus obligatory in the first degree, that is, *fard*, when the command to do it is conveyed in a clear and definitive text of the Qur'ān or *Sunnah*. But if the command to do something is established in a speculative (*ẓannī*) authority, such as an *āḥād ḥadīth*, the act will be obligatory in the second degree (*wājib*). The obligatory commands to perform the *ṣalāh* and the *ḥajj*, and to obey one's parents are thus classified under *fard*, as they are each established in a definitive text of the Qur'ān. But the obligation to recite sūra al-Fātiḥah in *ṣalāh*, or to perform *ṣalaṭ al-witr*, that is, the three units of prayers which conclude the late evening prayers (*ṣalāt al-ʿishāʾ*), are on the other hand classified as *wājib*, as they are both established in the authority of *ḥadīth* whose authenticity is not completely free of doubt. A Muslim is bound to do acts which are obligatory either in the first or in the second degree; if he does them, he secures reward and spiritual merit, but if he wilfully neglects them, he makes himself liable to punishment. The difference between the two classes of obligations, according to the vast majority of the jurists, including the Hanafis, is that the person who refuses to believe in the binding nature of a command established by definitive proof becomes an unbeliever, but not if he disputes the authority of an obligatory command of the second degree, although he becomes a transgressor. Thus to neglect one's obligation to support one's wife, children and poor parents amounts to a sin but not to infidelity.⁷

Another consequence of the distinction between *fard* and *wājib* is that when the former is neglected in an act required by the *Shar'i ah*, the act as a whole becomes null and void (*bāṭil*). If, for example, a person leaves out the bowing (*rukʿa*) or prostration (*sajdah*) in obligatory prayers, the whole of the prayer becomes null and void. But if he leaves out the recitation of al-Fātiḥah, the *ṣalāh* is basically valid, albeit deficient. This is the Hanafi view, but according to the majority the *ṣalāh* is null and void in both cases. However, the difference between the Hanafis and the majority in this respect is regarded as one of form rather than substance, in that the consequences of their disagreement are negligible on the whole.⁸ Al-Ghazālī is representative of the majority opinion, including that of the Shāfi'is, when he writes: 'As far as we are concerned, there is no difference between *fard* and *wājib*; the two terms are synonymous. According to the Hanafis, *fard* is based on definitive authority but *wājib* is founded in speculative proof. Once again, we do not deny the division of *wājib* into definitive and speculative (*maqtūʿ wa-maznūn*), and there is no

objection to the use of different expressions once their meaning is clear.⁹

Wājib is sub-divided into at least three varieties, the first of which is its division into personal (*ʿaynī*) and collective (*kafāʾī*). *Wājib ʿaynī* is addressed to every individual *sui juris* and cannot, in principle, be performed for or on behalf of another person. Examples of *wājib* (or *fard*) *ʿaynī* are *ṣalāh*, *ḥajj*, *zakāh*, fulfilment of contracts and obedience to one's parents. *Wājib kafāʾī* consists of obligations that are addressed to the community as a whole. If only some members of the community perform them, the law is satisfied and the rest of the community is absolved of it. For example, the duty to participate in *jihād* (holy struggle), funeral prayers, the *ḥisbah*, (promotion of good and prevention of evil), building hospitals, extinguishing fires, giving testimony and serving as a judge, etc., are all collective obligations on the community, and are thus *wājib* (or *fard*) *kafāʾī*. Thus when a person dies leaving no property to meet the cost of his burial, it is the *wājib kafāʾī* of the community to provide it and to give him a decent burial. Only some members of the community may actually contribute toward the cost, but the duty is nevertheless discharged from the whole of the community. The merit (*thawāb*), however, only attaches to those who have actually taken part in discharging the *wājib kafāʾī*.

There is some disagreement on whether the duty in a *wājib kafāʾī* is individually directed to all members of the Muslim community or to a group of them only. The *jumhūr* position on this is that the original address (*khiṭāb*) is to all individuals without any reference to such things as the ability and qualifications of the prospective participants.

The collective obligation sometimes changes into a personal obligation. This is, for example, the case with regard to *ijtihād*, which is a *wājib kafāʾī*, although when the enemy attacks and besieges a locality, it becomes the personal duty of every resident to defend it. Similarly, when there is only one *mujtahid* in a city, it becomes his personal duty to carry out *ijtihād*.¹⁰

From the viewpoint of the time of its performance, *wājib* is also divided into *wājib muwaqqat* (or *muʿayyad*), that is, *wājib* which is contingent on a time-limit, and *wājib muṭlaq*, that is, 'absolute *wājib*', which is free of such a limitation. Fasting and the obligatory *ṣalāh* are examples of contingent *wājib*, as they must each be observed within specified time limits. But performing the *ḥajj* or the payment of an expiation (*kaffārah*) are not subject to such restrictions and are therefore absolute *wājib*. Provided that one performs the *ḥajj* once during one's lifetime and pays the *kaffārah* at any time before one dies, the

duty is discharged.¹¹ Furthermore, the absolute *wājib* is called absolute because there is no time-limit on its performance and it may be fulfilled every time whenever the occasion arises. This is, for example, the case regarding one's duty to obey one's parents, or the obligation to carry out *ḥisbah*, namely, to promote good and to prevent of evil as and when the occasion arises.

Wājib muwaqqat is sub-divided into flexible (*muwassa'*), inflexible (*mudayyaq*) and twin-faceted (*dhū shabḥayn*). There are time limits in all of these but there is some flexibility, in the case of *muwassa'*, where a duty is performed within a time-frame. The midday prayer (*ṣalāt al-ẓuhr*), for example, may be performed any time from the beginning to the end of its time segment. This flexibility is not available, however, in the *wājib mudayyaq*, such as the fasting of Ramaḍān, which is inflexible not only in terms of the beginning and the end of fasting, but also in that no other variety of fasting may be observed in the month of Ramaḍān. In the case of *wājib muwassa'*, and the example we gave of *ṣalāt al-ẓuhr*, the position is once again flexible in that other forms of *ṣalāh* may be performed within the time period of *ẓuhr*. The twin-faceted *wājib*, or *dhū shabḥayn*, is so-called because it has an aspect in common with the *muwassa'* in that it can be performed any time during the months of *ḥajj*, that is, Shawwāl and Dhu'l-Hijjah. But it is *mudayyaq* in that only one *ḥajj* can be performed on specific days, such as the *unquf* which is on the ninth day of Dhu'l-Hijjah. Another aspect in common with *muwassa'* in this case is that one performs either the obligatory *ḥajj*, or a supererogatory *ḥajj*, during particular months.

A consequence of this division is that *wājib muwaqqat* materialises only when the time is due for it; it may neither be hastened nor delayed, but within the given time limits the *mukallaf* has a measure of flexibility. Furthermore, to fulfil a contingent *wājib*, it is necessary that the *mukallaf* have the specific intention (*niyyah*) to discharge it.¹²

Lastly, the *wājib* is divided into quantified *wājib* (*wājib muḥaddad*) and unquantified *wājib* (*wājib ghayr muḥaddad*). An example of the former is *ṣalāh*, *zakāh*, payment of the price (*thaman*) by the purchaser in a sale transaction, and payment of rent in accordance with the terms of a tenancy agreement, all of which are quantified. Similarly, enforcement of the prescribed penalties (*ḥudūd*) falls under the rubric of *wājib muḥaddad* in the sense that the *ḥadd* penalties are all specified in terms of quantity. The unquantified *wājib* may be illustrated by reference to one's duty to support one's close relatives, charity to the poor, feeding the hungry, paying a dower (*mahr*) to one's wife, the

length of standing (*qiyām*), bowing and prostration in *ṣalāh*, wiping the head in ablution (*wuḍū'*) and quantifying the *ta'zīr* penalties for offences that are punishable but in regard to which the Lawgiver has not quantified the punishment. (It is for the judge to quantify the punishment in the light of the individual circumstances of the offender and the offence.) Consequently, the *mukallaf*, whether the individual believer, the *qāḍī* or the imam, enjoys the flexibility to determine the quantitative aspect of the unquantified *wājib* himself.¹³

A consequence of this division is that if the quantified *wājib* is not discharged within the given time-limit, it constitutes a liability on the person (*dhiḥmah*) of the individual, as in the case of unpaid *zakāh* or an unpaid debt. Failure to discharge a *wājib ghayr muḥaddad*, on the other hand, does not result in personal liability.

A question arises with regard to the value of the excessive portion in the supererogation of quantified *wājib*. The question is whether an over-fulfilment of this type becomes a part of the *wājib* itself. There are two main views on this, one of which maintains that excessive performance in quantified *wājib* also becomes a part of the *wājib*. But the preferred view is that any addition to the minimal requirement becomes *mandūb* only, for no punishment can be imposed for a failure to perform anything in addition to the minimum required.¹⁴

And lastly, from the viewpoint of its fulfilment, the *wājib* is divided into *mu'ayyan* (specified) and *mukhayyar* (optional). The demand to perform the former is concerned with a specific act, such as prayer and *zakāh*, which leaves the *mukallaf* with no option to perform another act instead. All the five obligatory duties, known as the five pillars, consist of specified *wājib*. Another example would be to return a borrowed or usurped item to its owner. The optional *wājib* is one in which the demand is concerned with the performance of an unspecified act out of a limited number of alternatives, such as the obligation to expiate the breaking of an oath. The *mukallaf* is given the choice to do one of four things, namely, feed ten indigent persons, clothe them, free a slave or fast three days (cf. al-Mā'idah, 5:89). Sometimes the option is between unequal things, such as between a *wājib* and a *mandūb*, in which case the latter course is preferred. According to a Qur'ānic injunction (al-Baqarah, 2:280), if the debtor is in dire straits, he must be granted a respite (*wājib*), but it is recommended (*mandūb*) that the debt be waived as charity.¹⁵

It would be inaccurate to say that a means to a *wājib* is also a *wājib*, or that a necessary ingredient of *wājib* is also *wājib* in every case. For such a view would tend to ignore the personal capacity of the *mukallaf*,

especially if the latter is unable to do what is required of him, in the event, for example, when the Friday congregational prayer cannot be held for lack of a large number of people in a locality. It would be more accurate to say that when the means to *wājib* consist of an act that is within the capacity of the *mukallaf* then that act is also *wājib* upon him.¹⁶

The distinction between *wājib* and *mandūb* is, broadly speaking, based on the idea that ignoring the *wājib* entails punishment (*'iqāb*) while ignoring the *mandūb* does not. The distinction between *harām* and *makrūh* is based on a similar criterion: if doing something is punishable, it is *harām*, otherwise it is *makrūh*. This is generally correct, but one must add the proviso that punishment is not a necessary requirement of a binding obligation, or *wājib*. In addition, as Imām Ghazālī points out, the element of punishment, whether in this world or in the Hereafter, is not a certainty. Whereas in its positive sense the *wājib* is normally enforceable in this world, and might also lead to a tangible advantage or reward, the spiritual punishment for its neglect is, however, awaited and postponed to the hereafter. Hence the threat of punishment is not a necessary requirement of *wājib*. When God Almighty renders an act obligatory upon people without mentioning a punishment for its omission, the act so demanded is still *wājib*.¹⁷

A *wājib* may be discharged within its prescribed time, that is, by way of *adā'*, or by way of belated performance (*qaḍā'*), or even a repeated but better performance, that is *i'ādah*. Timely performance (*adā'*) may either be perfect (*adā' kāmīl*), which is the ideal performance of an act in due regard of its essence and attributes, or it may be imperfect (*adā' qaṣīr*) which falls short of some attributes. An example of the former is to perform an obligatory *ṣalāh* in congregation, and of the latter is to perform it individually. *Adā' kāmīl* is a perfect performance whereas *adā' qaṣīr* is defective and should, whenever possible, be compensated for; however, the obligation is fulfilled and the person does not incur a sin. Belated performance (*qaḍā'*) is also of two kinds, namely, complete restitution (*qaḍā' kāmīl*) and restitution that is incomplete. The former occurs in respect of duties that can be measured and quantified, and the latter when the original obligation is restituted in substance but not in form. An example of the latter is when the monetary value of a duty, instead of the original substance, is given as a substitute. In the case of restoration or *i'ādah*, the original duty is fulfilled yet owing to some defect, or even in the absence of defect, it is repeated for greater merit. A person may, for example, have performed the *ṣalāh* individually, but repeats the same by performing

it in congregation, or he remembers that he had made an error in its original performance.

1.2 *Mandūb* (Recommended)

Mandūb denotes a demand from the Lawgiver which asks the *mukallaf* to do something that is, however, not binding on the latter. To comply with the demand earns the *mukallaf* spiritual reward (*thawāb*), but no punishment is inflicted for failure to perform. Creating a charitable endowment (*waqf*), for example, giving alms to the poor, fasting on days outside Ramaḍān, attending the sick, etc., are duties of this kind. *Mandūb* is variously known as *Sunnah*, *mustahabb* and *nafil*, which are all here synonymous and covered by the same definition.¹⁸ If it is an act which the Prophet performed on some occasions but omitted on others, it is called *Sunnah*. There are two types of *Sunnah*, namely *Sunnah mu'akkadah* (the emphatic *Sunnah*, also known as *Sunnah al-hudā*), and *Sunnah ghayr mu'akkadah*, or supererogatory *Sunnah*. The call to congregational prayers (i.e. the *adhān*), attending congregational prayers and gargling as a part of the ablution (*wuḍū'*) are examples of the former, whereas non-obligatory charity, and supererogatory prayers preceding the obligatory *ṣalāh* in early and late afternoon (i.e. *zuhr* and *'aṣr*) are examples of supererogatory *Sunnah*. Performing the emphatic *Sunnah* leads to spiritual reward from Almighty God while its neglect is merely blameworthy but not punishable. However, if the entire population of a locality agree to abandon the emphatic *Sunnah*, they are to be fought for contempt of the *Sunnah*. To perform the supererogatory *Sunnah*, on the other hand, leads to spiritual reward while neglecting it is not blameworthy. There is a third variety of *Sunnah* known as *Sunnah al-zawā'id*, or *mandūb al-zawā'id*, which mainly refers to the acts and conduct performed by the Prophet as a human being, such as his style of dress and choice of food, etc., whose omission is neither abominable nor blameworthy. This is basically a Hanafi classification. The other *madhāhib* have not classified the *mandūb* which, to them, is variously known as *Sunnah*, *nāfilah*, *mustahabb*, *ihsān*, *faḍīlah* and *taṭawwū'*. According to the Shāfi'is, if the Prophet performed an act regularly, it is called *Sunnah*, but if he performed it only once or twice, it is called *mustahabb*. It is *taṭawwū'*, on the other hand, if someone does a voluntary act of benefit without following a particular precedent. These are acts of religious merit over and above the *Sunnah* and *mustahabb*. The Mālikī perception of *Sunnah* and *mustahabb* (also

known as *raghā'ib*) is similar to that of the Shāfi'is. A slight difference may be noted, however, in the Mālikī concept of *nawāfil*, which is almost the same as *tatawun*¹ but, to the Mālikīs, it means acts of religious merit according to the general rules of *Sharī'ah* on which the Prophet has given no specific instruction.

The Ḥanbalīs have not differed significantly with the rest in the designation of these concepts, except perhaps by using additional terms such as *ṣā'ah*, *qurbah* and *ihsān*, which they use almost synonymously with *mandūb*.

Al-Shāṭibī has observed that in a general sense the *mandūb* serves as an aid to the *wājib*, either in the capacity of a prelude (*muqaddimah*) or as a reminiscent (*tidhikār*) to *wājib*. It may belong to the genus of the *wājib*, such as supererogatory prayer, fasting, alms-giving and *hajj*, or it may not belong to the genus of *wājib*, such as cleanliness of the body and clothes, hastening in opening the fast and delaying the *ṣuḥūr* meal, or refraining from idle talk while fasting.¹⁹

Mandūb often occurs in the Qur'ān in the form of a command which is then accompanied by indications to suggest that the command is only intended to convey a recommendation. An example of this is the Qur'ānic command requiring that the giving and taking of period loans must be set down in writing (al-Baqarah, 2:283). But the subsequent portion of the same passage provides that 'if any of you deposits something with another, then let the trustee [faithfully] discharge his trust'.

فإن أمن بعضكم بعضاً فليؤد الذي ائتمن أمانته

This passage implies that if the creditor trusts the debtor, they may forego the requirement of documentation. Another example of a command that only denotes a recommendation is the Qur'ānic provision regarding slaves, where the text provides, 'And if any of your slaves seek their release from you in writing, set them free if you know any good in them' (al-Nūr, 24:33).

والذين يبتغون الكتاب مما ملكت أيمانكم فكاوتهم

إن علمتم فيهم خيراً

The last portion of this text indicates an element of choice which renders the command therein *mandūb*. But in the absence of such accompanying evidence in the text itself, the Qur'ānic command is

sometimes assessed as *mandūb* by reference to the general principles of the *Sharī'ah*.

Sometimes the *mandūb* is conveyed in persuasive language rather than as a command *per se*. An example of this is the *ḥadīth* which states: 'Whoever makes an ablution for the Friday prayers, it is good, but if he takes a bath, it is better.'²⁰

من توضأ يوم الجمعة فيها ونعمت

ومن اغتسل فالفعل أفضل.

A question arises in this connection as to whether the *mandūb* remains a *mandūb* once it has been started, or becomes obligatory of continuation until it is completed. The Hanafīs have held that once the *mandūb* is commenced, it turns into an obligation and must be completed. For example, when a person starts a supererogatory fast, according to this view, it is obligatory that he complete it, and failure to do so renders him liable to the duty of belated performance (*qadā'*). But according to the Shāfi'is, whose view here is generally preferred, the *mandūb* is never turned into *wājib* and always remains a *mandūb*, thereby leaving the person who has started it with the choice of discontinuing it whenever he wishes. There is thus no duty of belated performance (*qadā'*) on account of failure to complete a *mandūb*.²¹

I.3 *Ḥarām* (Forbidden)

According to the majority of 'ulamā', *ḥarām* (also known as *maḥzūr*) is a binding demand of the Lawgiver in respect of abandoning something, which may be founded in a definitive or a speculative proof. Committing the *ḥarām* is punishable and omitting it is rewarded. But according to the Hanafīs, *ḥarām* is a binding demand to abandon something that is established in definitive proof; if the demand is founded in speculative evidence, it constitutes a *makrūh taḥrīmī*, but not *ḥarām*. The former resembles the latter in that committing both is punished and omitting them is rewarded. But the two differ from one another insofar as the wilful denial of the *ḥarām* leads to infidelity, which is not the case with regard to *makrūh taḥrīmī*.²²

The textual evidence for *ḥarām* occurs in a variety of forms, which may be summarised as follows. Firstly, the text may clearly use the word *ḥarām* or any of its derivatives. For example, the Qur'ānic text

which provides, 'Forbidden to you are the dead carcass, blood and pork and that which has been dedicated to other than God' (al-Mā'idah, 5:3)

حرمت عليكم الميتة والدم ولحم الخنزير وما أهل به لغير الله
and 'God has permitted sale and prohibited usury' (al-Baqarah, 2:275).

وأحل الله البيع وحرم الربا

Similarly, the *hadith* that provides, 'Everything belonging to a Muslim is forbidden to his fellow Muslims: his blood, his property and his honour'.²³

كُلُّ الْمُسْلِمِ عَلَى الْمُسْلِمِ حَرَامٌ ؛ دَمُهُ وَمَالُهُ وَعَرَضُهُ.

Secondly, *harām* may be conveyed in other prohibitory terms which require the avoidance of a certain form of conduct. For example, there is the Qur'ānic text stating: 'Slay not the life that God has made sacrosanct, save in the course of justice' (al-An'ām, 6:151);

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ

and 'Devour not one another's property in defiance of the law' (al-Baqarah, 2:188).

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ

Thirdly, *harām* may be communicated in the form of a command to avoid a certain form of conduct. For example: there is the Qur'ānic text providing that wine-drinking and gambling are works of the devil and then orders the believers to 'avoid it' (al-Mā'idah, 5:90).

Fourthly, *harām* may be communicated through expressions such as 'it is not permissible' or 'it is unlawful' in a context that is indicative of total prohibition. For example, the Qur'ānic text proclaiming that 'it is not permissible for you to inherit women against their will' (al-Nisā', 4:19),

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا

or the *hadith* which provides, 'It is unlawful for a Muslim to take the property of another Muslim without his consent'.²⁴

لَا يَحِلُّ مَالُ امْرِئٍ مُسْلِمٍ إِلَّا بِطَيِّبٍ عَنْ نَفْسِهِ.

Fifthly, *harām* is also identified by the enactment of a punishment for a certain form of conduct. There are many instances of this in the Qur'an and *Sunnah*. The *hudūd* penalties are the most obvious examples of this variety of *harām*. As is implied by its name, the *hadd* penalty is specific in reference to both the quantity of punishment and the type of conduct it penalises. Alternatively, the text that communicates *tahrim* may only consist of an emphatic condemnation of a certain act without specifying the penalty for it as such. Thus the Qur'an prohibits devouring the property of orphans by denouncing it in the following terms: 'Those who eat up the property of orphans swallow fire into their own bodies' (al-Nisā', 4:10).

إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَى ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا

Harām is divided into two types: (1) *harām li-dhātih* or 'that which is forbidden for its own sake', such as theft, murder, adultery, marrying a close relative and performing *ṣalāh* without an ablution, all of which are forbidden for their inherent enormity; and (2) *harām li-ghayrih*, or 'that which is forbidden because of something else'. An act may have been originally lawful but made unlawful owing to the presence of certain circumstances. For example: a marriage that is contracted for the sole purpose of *tahlil*, that is, in order to legalise another intended marriage, performing *ṣalāh* in stolen clothes, and making an offer of betrothal to a woman who is already betrothed to another man. In each of these examples, the act involved is originally lawful but has become *harām* owing to the attending circumstances. A consequence of this distinction between the two varieties of *harām* is that *harām li-dhātih*, such as marriage to one's sister or the sale of dead carcasses, is null and void *ab initio* (*bāṭil*), whereas violating a prohibition that is imposed owing to an extraneous factor is *fāsid* (irregular) but not *bāṭil*, and as such may fulfil its intended legal purpose. A marriage which is contracted for the purpose of *tahlil* is clearly forbidden, but it validly takes place nevertheless. Similarly, a contract of sale which is concluded at the time of the Friday prayer is *harām li-ghayrih* and is forbidden. But according to the majority of 'ulamā' the sale takes place nevertheless, with the exception of the Hanbalis and Zāhirīs, who regard such a sale as *bāṭil*.²⁵ Even the

majority, however, have considered the ownership accruing upon such a sale undesirable (*al-milk al-khabīthah*) as it violates the prohibitory terms of the Qur'ān.

Another consequence of this distinction is that *ḥarām li-dhātih* is not permissible save in cases of dire necessity (*darūrah*) of a kind which threatens the safety of the 'five principles' of life, religion, intellect, lineage and property. In this way, uttering a word of infidelity, or drinking wine, is only permitted when it saves life. *Ḥarām li-ghayrih*, on the other hand, is permissible not only in cases of absolute necessity but also when it prevents hardship. Thus a physician is permitted to look at the private parts of a patient even in the case of illnesses that do not constitute an immediate threat to life.²⁵

Another criterion for distinguishing the two varieties of *ḥarām* mentioned by some 'ulamā' is that *ḥarām li-ghayrih* consists of an act that leads to *ḥarām li-dhātih*. In this way, looking at the private parts of another person is forbidden because it can lead to *zinā*, which is *ḥarām* itself. Similarly, marrying two sisters simultaneously is *ḥarām* because it leads to the severance of ties of kinship (*qat' al-arḥām*), which is *ḥarām* itself.²⁷

And lastly, in response to the question of whether an act that is *ḥarām* can be combined with one that is intended to seek closeness (*qurbah*) to God Most High, it is suggested that the *ḥarām* overrides the *qurbah*. Fasting on the day of 'īd, for example, is an act of *qurbah*, but is *ḥarām* on that particular day. In this case the fast is vitiated and the prohibitory element in it overrides the element of *qurbah*.

1.4 *Makrūh* (Abominable)

Makrūh is a demand of the Lawgiver that requires the *mukallaf* to avoid something, but not in strictly prohibitory terms. *Makrūh* is the opposite of *mandūb*, which means that neglecting the *mandūb* amounts to *makrūh*. Since *makrūh* does not constitute a binding law, we merely say that omitting something which is *makrūh* is preferable to committing it. The perpetrator of something *makrūh* is not liable to punishment and, according to the majority of 'ulamā', he does not incur moral blame either. The Ḥanafīs are in agreement with the majority view in respect of only one of the two varieties of *makrūh*, namely *makrūh tanzīhī*, but not in regard to *makrūh tahrīmī*. The latter, according to the Ḥanafīs, entails moral blame but no punishment. The 'ulamā' are all in agreement that anyone who avoids the *makrūh* merits praise and gains closeness to God.²⁸

The textual authority for *makrūh* may consist of a reference to something that is specifically identified as *makrūh*, or may be so identified by words that may convey an equivalent meaning. The word *makrūh* occurs in its literal sense in the following Qur'ānic passage: 'All of these are evil and abomination in the sight of your Lord' (*al-Iṣrā'*, 17:38).

كل ذلك كان سيئه عند ربك مكروها

The reference here is to a number of things, including walking on the earth with insolence, taking a stand on a matter without adequate knowledge, failure to give due measurement and weight and failure to keep one's promise. Another example of *makrūh* in the Qur'ān is premature questioning, as indicated in the following *āyah*: 'O you who believe, ask not questions about things which, if made clear to you, may trouble you. But if you ask about them when the Qur'ān is being revealed, they will be explained to you.' (*al-Mā'idah*, 5:101)

يا أيها الذين آمنوا لا تسألوا عن أشياء إن تبد لكم تسؤكم
وإن تسألوا عنها حين ينزل القرآن تبد لكم

The ruling 'ask not questions' is conveyed in the language of a prohibition, but since the latter part of the *āyah* permits asking questions, the prohibition is changed into a mere *makrūh*. This is also confirmed by another *āyah* which clearly permits asking questions: 'Ask those who know, if you know not yourselves' (*al-Naḥl*, 16:43).

فاسألوا أهل الذكر إن كنتم لا تعلمون

We also read in another Qur'ānic *āyah*: 'And seek not the bad to give in charity when you would not take it for yourselves save with disdain' (*al-Baqarah*, 2:267).

ولا تيمموا الخبيث منه تنفقون ولستم بأخذيه
إلا أن تمضوا فيه

The text here implies disapproval (*karāhah*) of giving defective things in charity such as one would not accept from others. There is a *ḥadīth*, for example, in which the Prophet discouraged any prayers at midday

until the decline of the sun with the exception of Friday. The actual word used in the *ḥadīth* is that the Prophet disliked (*kariha al-nabī*) prayers at that particular time.²⁹

كره النبي نصف النهار حتى تزول الشمس ، إلا يوم الجمعة.

We also read in another *ḥadīth* recorded by al-Bukhārī that 'idle talk, excessive questioning and extravagance have all been disapproved of'.

كره لكم قيل وقال وكثرة السؤال وإضاعة المال.

An equivalent term to *maknūh* occurs, for example, in the *ḥadīth* which reads: 'The most abominable of permissible things in the sight of God is divorce'.³⁰

أبغض الحلال عند الله الطلاق.

Maknūh may also be conveyed in the form of a prohibition but in language that only indicates reprehensibility. An example of this is the aforementioned Qur'ānic text which states, in an address directed to the believers, 'O you who believe, ask not questions about things which, if made clear to you, would trouble you. But if you ask about them when the Qur'ān is being revealed, then they will be explained to you' (al-Mā'idah, 5:101).

لا تسألوا عن أشياء إن تبد لكم تسؤكم وإن تسألوا عنها حين
يسر القرآن تبد لكم

An example of this style of communication in the *ḥadīth* is as follows: 'Leave that of which you are doubtful in favour of that which you do not doubt'.³¹

دع ما يريبك إلى ما لا يريبك.

Maknūh is the lowest degree of prohibition (*tahrim*), and in this sense is used as a convenient category for matters that fall between *ḥalāl* and *ḥarām*, that is, matters which are definitely discouraged but where the evidence to establish them as *ḥarām* is less than certain.³²

As already noted, the Ḥanafīs have divided *maknūh* into the two types of *maknūh tanzihī* and *maknūh tahrimī*. The former is considered

abominable for purposes of keeping pure such as avoiding raw onion and garlic just before going to congregational prayers, or neglecting *ṣalāt al-nafl*, that is, supererogatory prayers preceding, for example, the *ṣalāt al-zuhr* (early afternoon prayers). This kind of *maknūh* is nearer to *mubāh* than to *ḥarām*. Its commission is not punished, but its omission is rewarded. The Ḥanafī description of *maknūh tanzihī* is the same as that which the majority of 'ulamā' have given to *maknūh* in general. The majority of 'ulamā' have characterised the value of *maknūh* to be that 'committing it is not punishable but omitting it is praise-worthy'. *Maknūh tahrimī* or 'abominable to the degree of prohibition' is, on the other hand, nearer to *ḥarām*. An act is *ḥarām* when its prohibition is decreed in definitive terms, otherwise it is *maknūh tahrimī*. An example of *maknūh tahrimī* is the wearing of gold jewellery and silk garments for men, which are forbidden by an *āḥād* (solitary) *ḥadīth*. While referring to these two items, the *ḥadīth* provides: 'These are forbidden to the men of my community but are lawful to their women'.³³

هذان حرامان لرجال أمي حلالان لنسائهم.

Similarly, it is *maknūh tahrimī* for a person to offer to buy something for which another person has already made an offer. There is a *ḥadīth* that forbids this kind of purchase in the same way as it forbids making an offer of engagement to a woman who is already betrothed to another man.³⁴

لا يبيع الرجل على بيع أخيه ولا يخطب على خطبة أخيه
إلا أن يأذن له.

Since both of the foregoing *ḥadīth* are *āḥād* whose authenticity is not devoid of doubt, the prohibition therein is reduced from *ḥarām* to *maknūh tahrimī*.

The difference between the Ḥanafīs and the majority of 'ulamā' relates to the nature of the evidence on which the *maknūh* is founded. When a prohibition is conveyed in an imperative demand of the Lawgiver but there is some doubt in its authenticity or meaning, the majority of 'ulamā' classify it as *ḥarām*, whereas the Ḥanafīs classify it as *maknūh tahrimī*. The Ḥanafī position in regard to the division of *maknūh* into these two types is essentially similar to their approach in regard to drawing a distinction between *farḍ* and *wājib*.³⁵

Maknūh tanzihī is a demand of the Lawgiver that is not conveyed

in emphatic or imperative terms. Committing *makrūh tanzīhī* does not lead to punishment or moral blame, yet it does amount to neglecting that which is best and meritorious, such as consuming horse meat at a time of war when horses are in short supply, or making ablution with water left over by a cat or a meat-eating bird, and also to abandon *Summah mu'akkadah* and *mandūb*.

1.5 *Mubāh* (Permissible)

Mubāh (also referred to as *halāl* and *jā'iz*) is defined as communication from the Lawgiver concerning the conduct of the *mukallaf* that gives him the option to do or not do something. The Lawgiver's communication may be in the form of a clear *naṣṣ*, such as the Qur'ānic text providing, in a reference to foodstuffs, that 'this day all things good and pure have been made lawful to you' (al-Mā'idah, 5:5).

اليوم أحل لكم الطيبات

Alternatively the text may state that the *mukallaf* will not incur a sin, blame or liability if he wishes to act in a certain way. Concerning the permissibility of betrothal, for example, the Qur'an states, 'There is no blame on you if you make an offer of betrothal to a woman' (al-Baqarah, 2:235).

ولا جناح عليكم فيما عرضتم به من خطبة النساء

Similarly, committing a sinful act out of sheer necessity is permissible on the authority of the Qur'an, which provides, 'If someone is compelled by necessity without wilful disobedience or transgression, then he is guiltless' (al-Baqarah, 2:173).³⁶

فمن اضطر غير باغ ولا عاد فلا إثم عليه

Sometimes a command in the Qur'an may only amount to permissibility when the nature of the conduct in question or other relevant evidence indicates that this is the case. An example of this is the text that orders worshippers to 'scatter in the earth' once they have completed the Friday prayers (al-Jumu'ah, 62:10). Although the believers have been ordered to 'scatter in the earth', the nature of this command and the type of activity to which it relates suggest that it conveys permissibility only.

In the event where the law provides no ruling to specify the value of a certain form of conduct, then according to the doctrine of *istishāb al-aṣl* (presumption of continuity), permissibility (*ibāhah*) remains the original state that is presumed to continue. The authority for this presumption is found in the Qur'ānic text which provides, in an address to mankind, that God Almighty 'has created everything in the earth for your benefit' (al-Baqarah, 2:29).

هو الذي خلق لكم ما في الأرض جميعا

By implication, it is understood that the benefit in question cannot materialise unless 'everything in the earth' is made *mubāh* for mankind to use and to utilise in the first place.

Mubāh has been divided into three types. The first is *mubāh* that does not entail any harm to the individual whether he acts upon it or not, such as eating, hunting or walking in the fresh air. The second type of *mubāh* is that whose commission does not harm the individual, although it is essentially forbidden. Included in this category are the prohibited acts that the Lawgiver has made permissible on account of necessity, such as uttering words of unbelief under duress, or eating the flesh of a dead carcass to save one's life. The third variety of *mubāh* is not really *mubāh per se*; it is included under *mubāh* for lack of a better alternative. This category of *mubāh*, also known as '*auf*' (forgiven), consists of things that were practised at one time but were then prohibited with the proviso that those who indulged in them before the prohibition are exonerated. The Qur'an thus prohibits marriage with certain relatives, and the text then continues to make an exception for such marriages that might have occurred in the past (al-Nisā', 4:22). Similarly, wine-drinking was not prohibited until the Prophet's migration to Medina, and fell under the category of *mubāh* until the revelation of the *āyah* in sūra al-Mā'idah (5:90) which imposed a total ban on it.³⁷

It would be incorrect, as al-Ghazālī explains, to apply the term *mubāh* to the acts of a child, an insane person, or an animal, nor would it be correct to call the acts of God *mubāh*. Acts and events that took place prior to the advent of Islam are not to be called *mubāh* either. 'As far as we are concerned, our position regarding them is one of abandonment [*tark*]', which obviously means that such activities are not to be evaluated at all. *Mubāh* proper, al-Ghazālī adds, is established in the express permission of Almighty God which renders the commission or omission of an act permissible either in religious terms

or in respect of a possible benefit or harm that may accrue from it in this world.¹⁸

The 'ulamā' of *uṣūl* definitely consider *mubāh* to be a *hukm shar'i*, although including it under *al-hukm al-taklifi* is on the basis of mere probability as there is essentially no liability [*taklif*] in *mubāh*. The 'ulamā' of all schools have consistently included *mubāh* as one of the five varieties of defining law. The Hanafis have only differed with the majority with regard to the sub-divisions of *wājib* and *makrūh* as already explained, but not with regard to *mubāh*. *Mubāh* is once again divided into four types.

(1) Acts that are *mubāh* on the individual level but *wājib* for the community as a whole. For example, eating, drinking and marriage are *mubāh* for the individual, but total abstinence from them is forbidden and they become obligations on the collective level. Similarly, the choice of profession and employment is *mubāh* for individuals, but the community as a whole is under obligation to ensure the survival of certain types of industry and trade.

(2) Acts that are *mubāh* on the individual level but are *mandūb* on the collective level. Living in good style, eating the best food and wearing elegant clothes, for example, are *mandūb*, but it is *mubāh* for a rich individual nevertheless to lead a simple life. Yet it is desirable (*mandūb*) that wealthy people in general should live in an appropriate style.

(3) Acts that are *mubāh* on an occasional basis but forbidden (*harām*) if pursued on a regular and habitual basis. For example, gossiping, swearing or harshness to one's child are *mubāh*, but they become *harām* if practised regularly.

(4) Some acts, although originally *mubāh*, become *makrūh* with habitual performance. Playing chess or music, for example, or playing with pigeons, are *mubāh*, but they become *makrūh* if one spends a considerable amount of time on such things.

A single act may fall into one or more of these categories, depending on the circumstances in which it is attempted. Marriage, for example, may become obligatory upon a Muslim who has the necessary means and feels assured that he will fall into sin without it. It may, on the other hand, be *mandūb* if he has the financial means and yet does not see himself on the verge of committing sin without marriage. And then marriage is *makrūh* for one who fears being oppressive and unjust to his wife, and eventually *harām* if one is certain that this will be the case.¹⁹ Bearing in mind the sub-division of *wājib* and *makrūh* that the Hanafis have added to *al-hukm al-taklifi*, the Hanafis thus

classify the latter into seven types, whereas the majority divide it into five varieties only.

II. Declaratory Law (*al-Hukm al-Waḍ'i*)

'Declaratory law' is defined as communication from the Lawgiver which enacts something into a cause (*sabab*), a condition (*shart*) or a hindrance (*māni'*) to something else. This may be illustrated by reference to the Qur'anic text regarding the punishment of adultery, which causes the act of adultery itself to be the cause of its punishment (al-Baqarah, 2:24). An example of the declaratory law which consists of a condition is the Qur'anic text on the pilgrimage of *hajj*: 'Pilgrimage is a duty owed to God by people who can manage to make the journey' (Āl 'Imrān, 3:97).

وَلِلّٰهِ عَلَى النَّاسِ حِجُّ الْبَيْتِ مِنْ اسْتَطَاعَ اِلَيْهِ سَبِيْلًا

Both of the foregoing texts, in fact, consist of a defining law and a declaratory law side by side. The defining law in the first text is the ruling that the adulterer must be punished with a hundred lashes, and in the second text it is the duty of the *hajj* pilgrimage itself. The declaratory law in the first text is the cause, and in the second, it is the condition that must be present if the law of the text is to be implemented. The second of the two texts thus enacts the ability of the individual to make the journey into a condition for performing the pilgrimage. A more explicit example of a declaratory law is the *hadith* stating that 'there is no *nikāh* without two witnesses'.⁴⁰

لَا نِكَاحَ إِلَّا بِشَاهِدَيْنِ.

The presence of two witnesses is thus rendered a condition for a valid marriage. And lastly, an example of a declaratory law consisting of a hindrance is the *hadith* providing that 'there shall be no bequest to an heir'.⁴¹

لَا وَصِيَّةَ لَوَارِثٍ.

which obviously enacts the tie of kinship between the testator and the legatee into a hindrance to bequest. Similarly, the *hadith* that lays down the rule that 'the killer shall not inherit'

لا يرث القاتل.

renders killing a hindrance to inheritance.⁴²

The execution of the defining law is normally within the capacity of the *mukallaf*. The demands, for example, addressed to the *mukallaf* concerning prayers and *zakaḥ* are both within his means. Declaratory law may, on the other hand, be within or beyond the capacity of the *mukallaf*. For instance, the arrival of a particular time of day which is the cause (*sabab*) of *ṣalāḥ* is beyond the means and capacity of the worshipper.⁴³

The function of declaratory law is explanatory in relation to defining law, in that the former explains the component elements of the latter. Declaratory law thus informs us whether certain facts or events are the cause, condition or hindrance in relationship to defining law. It is, for example, by means of declaratory law that we know offer and acceptance in a contract of sale to be the cause of the buyer's ownership, that divorce causes the extinction of marital rights and obligations, and that the death of a person is the cause of the right of the heir to his inheritance. Similarly, it is by means of a declaratory law that we know intellectual maturity to be the condition of voluntary disposition of property in gift (*hibah*) and charitable endowment (*waqf*).⁴⁴

The basic notion of dividing the rules of *Shari'ah* into *taklifi* and *waḍ'i* is also applicable to modern western law. When we read in the rent act, for example, a clause that requires the tenant to pay the rent in accordance with the tenancy contract, this is a *ḥukm taklifi* which consists of a command. Similarly, when there is a clause which requires the tenant not to use the premises for commercial purposes, this is a demand consisting of a prohibition. And if there is a clause to the effect that the tenant may sublet the property, this is an option that the tenant may or may not wish to exercise. Needless to say, any aspect of such provisions may be subjected to such conditions or hindrances as the contracting parties may wish to stipulate.⁴⁵

As noted above, declaratory law is divided into five varieties. The first three of these, namely, cause, condition and hindrance, have already been discussed to some extent. Two other varieties that are added to these are the *'azimah* (strict law) as opposed to *nukhsah* (concessionary law), and valid (*ṣāḥih*) as opposed to invalid (*bāṭil*). To include the first three under *al-ḥukm al-waḍ'i* is obvious from the very definition of the latter. But classifying the last two divisions under *al-ḥukm al-waḍ'i* may need a brief explanation. It is well to point out in this connection

that almost every concession that the Lawgiver has granted to the individual is based on certain causes which must be present if the concession is to be utilised. The Lawgiver, for example, enacts travelling, illness or removal of hardship into the cause of a concession in regard to, say, fasting or *ṣalāḥ*, which is why *'azimah* and *nukhsah* are classified under *al-ḥukm al-waḍ'i*. Having said this, we note that many '*ulamā'* of *uṣūl* have differed and classified *'azimah* and *nukhsah* under *ḥukm taklifi*. In classifying *ṣāḥih* and *bāṭil* as subdivisions of declaratory law, it will be further noted that a *ḥukm* is valid when the conditions of its validity are fulfilled, and is invalid if these conditions are not met. In short, since the last two divisions are basically concerned with causes and conditions, they are included under the class of declaratory law.⁴⁶ We shall now proceed to discuss each of the five varieties of *al-ḥukm al-waḍ'i* separately, as follows.

II.1 Cause (*Sabab*)

A *sabab* is defined as an attribute that is evident and constant (*waḥf zāhir wa-mundabaf*) and which the Lawgiver has identified as the indicator of a *ḥukm* in such a way that its presence necessitates the presence of the *ḥukm* and its absence means that the *ḥukm* is also absent. A *sabab* may be an act that is within the power of the *mukallaf*, such as murder and theft in their status as the causes of retaliation (*qisās*) and a *ḥadd* penalty respectively. Alternatively, the *sabab* may be beyond the control of the *mukallaf*, such as minority being the cause of guardianship over the person and property of a minor. When the *sabab* is present, whether it is within or beyond the control of the *mukallaf*, its effect (i.e. the *musabbab*) is automatically present even if the *mukallaf* had not intended it to be. For example, when a man divorces his wife by a revocable *ṭalāq*, he is entitled to resume marital relations with her even if he openly denies himself that right. Similarly, when a man enters into a contract of marriage, he is obligated to provide dower and maintenance for his wife even if he explicitly stipulates the opposite in their contract. For once the Lawgiver identifies something as a cause, the effect of that cause comes about by virtue of the Lawgiver's decree regardless of whether the *mukallaf* intended it to be so or not.⁴⁷

The presence of a *sabab* necessitates the presence of a *ḥukm*, whether or not the *sabab* is harmonious (*munāsib*) with the *ḥukm*, although some '*ulamā'* of *uṣūl* draw a distinction between *sabab* and '*illah* on this very basis. *Sabab* is thus reserved for a cause that is not harmonious with

the *hukm*, whereas a cause that is in harmony with its *hukm* is known as an '*illah*'. To illustrate this point, murder is the '*illah*' of the law of retaliation and so is travelling, which is the '*illah*' of concession not to observe the fast of Ramaḍān. In both cases the '*illah*' is harmonious with its *hukm*. But when we say that the decline of the sun is the cause (*sabab*) of the forenoon prayer, or that sighting the moon of Ramaḍān is the *sabab* of fasting, we cannot ascertain the harmony of the cause with the *hukm*. There is also a difference between '*illah*', *sabab* and *hikmah* in that *hikmah* refers to the benefit that is obtained from, or a harm that is prevented by, a particular *hukm*. *Hikmah* is also not an indicator of the *hukm* in all situations in that the presence or absence of the one does not necessarily have the same consequence for the other. *Sabab* is then of two kinds: one of which is a *sabab* that is within the capacity of the *mukallaf*, such as travelling being the *sabab*/*'illah* of breaking the fast; and one that is beyond the control of the *mukallaf*, such as the decline of the sun being the *sabab* of the forenoon prayer.

II.2 Condition (*Shart*)

A *shart* is defined as an evident and constant attribute whose absence necessitates the absence of the *hukm* but whose presence does not automatically bring about its object (*mashrūf*). For example, the presence of a valid marriage is a precondition of divorce, but this does not mean that when there is a valid marriage, it must lead to divorce. Similarly, the ablution (*wuḍū'*) is a necessary condition of *ṣalāh*, but the presence of *wuḍū'* does not necessitate *ṣalāh*. A condition normally complements the cause and gives it its full effect. Killing is, for example, the cause of retaliation; however, this is on condition that it is deliberate and hostile. The contract of marriage legalises/causes sexual enjoyment between the spouses; however, this is on condition that two witnesses testify to the marriage. The legal consequences of a contract are not fully realised without the fulfilment of its necessary conditions. A condition may be laid down by the Lawgiver, or by the *mukallaf*. Whenever the former enacts a condition, it is referred to as *shart shar'i*, or 'legal condition', but if it is a condition stipulated by the *mukallaf*, it is referred to as *shart ja'li*, or 'improvised condition'. An example of the former is witnesses in a marriage contract, and of the latter, the case when spouses stipulate in their marriage contract the condition that they will reside in a particular locality. A *shart* may be attached either to the *hukm* or to the cause of the *hukm*. An

example of the former is the condition that legal alms (*zakāh*) falls due upon the expiry of one year. The absence or non-fulfilment of this *shart* means that the *hukm*, or the obligation of *zakāh*, is also absent. Similarly, it is a condition of valid sale that the seller is able to deliver the subject-matter of the sale and the absence of this condition directly invalidates the sale. An example of the *shart* that is attached to the cause of the *hukm* rather than the *hukm* itself is the condition that killing must be deliberate in order to constitute the valid cause of retaliation. In this example, killing is the cause of retaliation and the condition that it must be intentional is attached to the cause rather than to the *hukm* directly. A command becomes effective by the presence of its cause (*sabab*) and it becomes binding by the fulfilment of its condition. A command, in other words, is not enforceable before its condition is fulfilled.

Shart also differs from *nukn* (pillar, essential requirement) in that the latter partakes of the essence of a thing. This would mean that the law, or *hukm*, could not exist in the absence of its *nukn*. When the whole or even a part of the *nukn* is absent, the *hukm* collapses completely, with the result that the latter becomes null and void (*bātil*). A *shart*, on the other hand, does not partake of the essence of a *hukm*, although it is a complementary part of it. Bowing and prostration (*rukū'* and *sajdah*), for example, are each an essential requirement (*nukn*) of *ṣalāh* and partake of the very essence of *ṣalāh*, but ablution is a condition of *ṣalāh* as it is an attribute whose absence disrupts the *ṣalāh* but which does not partake of its essence.⁴⁸

II.3 Hindrance (*Māni'*)

A *māni'* is defined as an act or an attribute whose presence either nullifies the *hukm* or the cause of the *hukm*. In either case, the result is the same, namely, that the presence of the *māni'* means the absence of the *hukm*. For example, difference of religion and killing, are both obstacles to inheritance between a legal heir and his deceased relative, despite the fact that there may exist a valid tie of kinship (*qarābah*) between them: when the obstacle is present, the *hukm*, which is inheritance, is absent.

From the viewpoint of its effect on the cause (*sabab*) or on the *hukm* itself, the *māni'* is divided into two types. First, the *māni'* which affects the cause in the sense that its presence nullifies the cause. An example of this is the indebtedness of a person who is liable to the payment of *zakāh*. The fact of his being in debt hinders the cause of *zakāh*,

which is ownership of property. A person who is in debt to the extent of insolvency is no longer considered, for purposes of *zakāh*, to be owning any property at all. Thus when the cause is nullified, the *hukm* itself, which is the duty to pay *zakāh*, is also nullified. Secondly, there is the hindrance which affects the *hukm*. The presence of this type of hindrance nullifies the *hukm* directly, even if the cause and the condition are both present. An example of this is paternity, which hinders retaliation: if a father kills his son, he is not liable to retaliation although he may be punished otherwise. Paternity thus hinders retaliation according to the majority of 'ulamā' (except Imam Mālik) despite the presence of the cause of retaliation, which is killing, and its condition, which is hostility and the intention to kill. Imam Mālik has held, on the other hand, that the father may be retaliated against for the deliberate killing of his offspring.⁴⁹

The *mukallaf* is under duty to observe the provisions of the law pertaining to *ṣabab*, *sharṭ* and *mānī*⁵⁰. There are certain restrictions that the law imposes, in the area of contracts, for example, on the liberty of the parties to insert conditions and stipulations into the terms of a given contract. Broadly speaking, a condition should not violate the essence of a contract, nor should it seek to circumvent the basic purpose of an act. To sell a book on condition that is not read, or sell it when one is not able to deliver it, are the sorts of conditions that go against the purpose and essence of sale. The *madhāhib* have differed on the extent of the liberty that the individual enjoys in the area of contracts and stipulations and the Hanbali school is the most liberal on this subject.

We also note with regard to *mānī*⁵¹ that it is not permissible for the *mukallaf* to create deliberate impediments so as to circumvent the commands of the *Shar'i*. The subject here is once again somewhat controversial and falls under what is known as *hiyal* (legal stratagems), most of which are suspect, although there may be some that serve a legitimate purpose. A man who is liable to *zakāh* should not, for example, make a gift of his property to his wife before the lapse of the year and then take it back from her after the expiry of the year, all with the purpose of avoiding the payment of *zakāh*.

II.4 Strict Law ('Azīmah) and Concessionary Law (Rukhṣah)

A law, or *hukm*, is an 'azīmah when its rigour is primary and unabated, without reference to any attenuating circumstances that may soften

its original force or even entirely suspend it. It is, in other words, a law as the Lawgiver had intended it in the first place. For example, *ṣalāh*, *zakāh*, the *hajj*, *jihād*, etc., which God has enjoined upon all competent individuals, are classified under 'azīmah. A law, or *hukm*, is a *rukḥṣah*, by contrast, when it is considered in conjunction with attenuating circumstances. Whereas 'azīmah is the law in its normal state, *rukḥṣah* embodies the exceptions, if any, that the Lawgiver has granted with a view to bringing facility and ease in difficult circumstances. Thus the law that grants a concession to travellers to break the fast during Ramaḍān is an exception to the norm that requires everyone to fast. The concessionary law in this case is valid only for the duration of travelling, after which the 'azīmah must be complied with again. Similarly, if a Muslim is compelled to renounce his faith, he is permitted to do so even though the strict law would require him to persist in his faith until death. The excuse in this case is founded in the right of the person to life, and is clearly granted in the Qur'ān (al-Nahl, 16:106), which allows the utterance of words of infidelity under duress. Strict law may consist of either commands or prohibitions. Thus the prohibition of murder, theft, adultery, wine-drinking, etc., are all instances of 'azīmah in the Qur'ān.⁵²

'Azīmah is a command of the Lawgiver that binds the *mukallaf*, while *rukḥṣah* embodies a concession in respect of that command. The two are interrelated in that *rukḥṣah* can only exist when there is 'azīmah in the first place. God Almighty has not made, for example, fasting in the month of Shawwāl (the month following Ramaḍān) obligatory upon Muslims. This is not a concession, as no obligation exists in the first place. Similarly, the normal state of *ibāḥah* regarding food and drink is not *rukḥṣah*, whereas the permission to eat prohibited meat in certain circumstances is *rukḥṣah*. It would also be incorrect to call the permissibility of *tayammum* (i.e. dry ablution with clean earth or sand) in the absence of water a *rukḥṣah*: when there is no water it is not possible to make an ablution proper (*wuḍū'*) in the first place. But *tayammum* is a *rukḥṣah* if it is a substitute for *wuḍū'* when the weather is extremely cold. The point is that in *rukḥṣah* the individual must be able to take an alternative course of action.⁵³

Rukḥṣah occurs in any of four varieties. Firstly, in the form of permitting a prohibited act on grounds of necessity, such as eating the flesh of a carcass, and drinking wine at the point of starvation or extreme thirst. Secondly, *rukḥṣah* may occur in the form of omitting a *wājib* when conformity to that *wājib* causes hardship, such as the concession granted to the traveller to shorten the quadruple *ṣalāh*, or

not to observe the fasting of Ramaḍān. Thirdly, in the area of transactions, *nukḥṣah* occurs in the form of validating contracts that would normally be disallowed. For example, lease and hire (*ijārah*), advance sale (*ṣalam*) and order for the manufacture of goods (*istiṣnāʾ*) are all anomalous, as the object of contract therein is non-existent at the time of contract, but they have been exceptionally permitted in order to accommodate the public need for such transactions. And lastly, *nukḥṣah* occurs in the form of concessions to the Muslim *ummah* from certain rigorous laws that were imposed under previous revelations. For example, *zakāh* to the extent of one-quarter of one's property, the non-permissibility of *ṣalāh* outside a mosque, and the illegality of taking booty (i.e. *ghanimah*), which were imposed on people under previous religions, have been removed by the *Shar'i ah* of Islam.³²

II.5 Valid, Irregular and Void (*Ṣaḥiḥ, Fāsid, Bāṭil*)

These are *Shar'i ah* values that describe and evaluate legal acts incurred by the *mukallaf*. To evaluate an act according to these criteria depends on whether or not the act in question fulfils the essential requirements (*arkān*) and conditions (*shurūṭ*) that the *Shar'i ah* has laid down for it, and whether or not there exist any obstacles to hinder its proper conclusion. For example, *ṣalāh* is a *shar'i* act and is regarded as valid when it fulfils all the essential requirements and conditions that the *Shar'i ah* has provided in this regard. Conversely, *ṣalāh* becomes void when any of its essential requirements and conditions are lacking. Similarly, a contract is described as valid when it fulfils all its necessary requirements and where there is nothing to hinder its conclusion; otherwise it is void. When *ṣalāh* is performed according to its requirements, it fulfils the *wājib*, otherwise the *wājib* remains unfulfilled. A valid contract gives rise to all its legal consequences whereas a void contract fails to satisfy its legal purpose.

The '*ulamā'* are in agreement that acts of devotion (*'ibādāt*) can either be valid or void, in the sense that there is no intermediate category in between. Legal acts are valid when they fulfil all the requirements pertaining to the essential requirements (*arkān*), causes, conditions and hindrances, and are void when any of these is lacking or deficient. An act of devotion that is void is non-existent *ab initio* and of no consequence whatsoever. The majority of '*ulamā'* have maintained a similar view with regard to transactions, namely, that a transaction is valid when it is complete in all respects. Only a valid contract of sale, for example, can give rise to its legal consequences, namely, the

transfer of ownership of the object of sale to the buyer and establishing the vendor's ownership over its price (*thaman*). A contract is void when it is deficient in respect of any of its requirements, although the *Ḥanafis* are in disagreement with the majority regarding the precise nature of this deficiency. The majority of '*ulamā'* maintain that invalidity is a monolithic concept in that there are no shades and degrees of invalidity. An act or transaction is either valid or void, and there is nothing in between. According to this view, *fāsid* and *bāṭil* are two words with the same meaning, whether in reference to devotional matters or to civil transactions. Likewise, to the majority it makes no difference whether the deficiency in a contract affects an essential element (*nukū*), such as the sale of a dead carcass, or a condition, such as sale for an unspecified price; both are void and non-existent *ab initio*.

The *Ḥanafis* have, however, distinguished an intermediate category between the valid and void, namely the *fāsid*. When the deficiency in a contract affects an essential requirement (*nukū*), the contract is null and void and fulfils no legal purpose. If, however, the deficiency in a contract only affects a condition, the contract is *fāsid* but not void. A *fāsid* contract, although deficient in some respects, is still a contract and entails some of its legal consequences, but not all. Thus a *fāsid* contract of sale establishes the purchaser's ownership over the object of sale when he has taken possession thereof, but does not entitle the purchaser to the usufruct (*intifāʾ*). Similarly, in the case of an irregular contract of marriage, such as one without witnesses, the spouses or the *qāḍī* must either remove the deficiency or dissolve the marriage, even if the marriage has been consummated. If the deficiency is known before consummation, the consummation is unlawful. But the wife is still entitled to the dower (*mahr*) and must observe the waiting period of '*iddah* upon dissolution of marriage. The offspring of a *fāsid* marriage is legitimate, but the wife is not entitled to maintenance, and no right of inheritance between the spouses can proceed from such a marriage.

The *Ḥanafis* describe the *fāsid* as something that is essentially lawful (*mashrūʿ*) but is deficient in respect of an attribute (*wasf*) as opposed to the *bāṭil* which is unlawful (*ghayr mashrūʿ*) on account of its deficiency in regard to both essence (*aṣl*) and attribute. The *Ḥanafī* approach to the *fāsid* is also grounded in the idea that the deficiency that affects the attribute but not the essence of a transaction can often be removed and rectified. If, for example, a contract of sale is concluded without assigning a specified price, it is possible to specify the price (*thaman*)

after the conclusion of the contract and thus rectify the irregularity at a later time, that is, as soon as it is known to exist or as soon as possible.⁵¹

III. The Pillars (*Arkān*) of *Hukm Shar'i*

The *hukm shar'i*, that is, the law or value of *Shar'i*, consists of three essential components. First of all, the *hukm* must have been authorised by the *hākim*, that is, the Lawgiver; it must also have a subject-matter which is referred to as *mahkūm fih*; and then an audience, namely, the *mahkūm 'alayh*, who must be capable of understanding or at least of receiving the *hukm*. We shall treat each of these under a separate heading, as follows.

III.1 The Lawgiver (*Hākim*)

The *'ulamā'* are unanimous that the source of all law in Islam is God Most High, whose will and command is known to the *mukallaf* either directly through divine revelation, or indirectly by means of inference, deduction and *ijtihad*. The Qur'ān repeatedly tells us that 'the prerogative of command belongs to God alone' (Al 'Imrān, 6:57).

إِنَّ الْحُكْمَ لِلَّهِ

We read in another text: 'And it behoves not a believing man or woman, when God and his Messenger have decided on a matter, to have any option above their decision' (al-Ahzāb, 33:36).

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا
أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ

Law and justice in the Muslim community must derive their validity and substance from the principles and values that the Lawgiver has sanctioned. This is the purport of the Qur'ānic text in sūra al-Mā'idah (5:45 and 5:49) which declares as unbelievers those who refuse to accept the authority of the divine law. Even the Prophet does not partake of the prerogative of command, as his command, or that of the ruler, the imam, the master or the father for that matter, does not constitute binding authority in its own right; instead, obedience to

such individuals is founded in the command of the Lawgiver. Neither is human intellect, or *'aql*, alone, a source of law in its own right.⁵²

The *'ulamā'* are in disagreement, however, as to the way in which the will or the *hukm* of the Lawgiver regarding the conduct of the *mukallaf* is to be known and identified. Can we know it by means of our intellectual faculty without the aid and mediation of messengers and scriptures, or is the human intellect incapable of ascertaining the law without divine guidance? A similar question arises concerning harmony and concordance between reason and revelation, in that when the human intellect determines that something is good (*hasan*) or evil (*qabih*), is it imperative that the *hukm* of the Lawgiver should be identical with the dictates of reason? In response to these questions, the *'ulamā'* have advanced three different views, which are as follows.

Firstly, the Ash'arites, namely the followers of Abu'l-Hasan al-Ash'ari (d. 314 AH), maintain that it is not possible for human intellect to determine what is good and evil in the conduct of the *mukallaf*, or to identify the *hukm* of the Lawgiver concerning the conduct of the *mukallaf*, without the aid of divine guidance. For human reasoning and judgment are liable to err. While an act may be evaluated by one person as good, another person may say the opposite. We normally say, for example, that honesty is good, but when it is likely to cause the death of an innocent person in the hands of a tyrant, it may be regarded as evil. It is therefore not for the human intellect to determine the values of things, and we cannot say that what the *'aql* deems to be good is necessarily good in the sight of God, or that what it considers evil is also evil in His sight. The Ash'arites thus maintain that right and wrong are not determined by reference to the nature of things, or our perception thereof, but are determined by God. This is because things are not good and evil by their nature. How can, then, the human intellect be expected to perceive that which is non-existent in the state of nature? When the Lawgiver permits or demands an act, we know that it is right/good, and when He forbids an act, it is certain that the act in question is wrong/evil. Hence the criterion of right and wrong is *shar'*, not *'aql*. According to this view, which is held by the majority of *'ulamā'*, what the law commands is good and what it forbids is evil. This view accords with what is known as the principle of the rule of law (also known as the principle of legality) which establishes that a man is not required to do something or to avoid doing it unless the law has been communicated to him in advance. No one is either rewarded for an act or punished for an omission unless he knows its status by means of a clear communication.

Thus when a person happens to be living in total isolation and has never received the message of the Lawgiver, he is not a *mukallaf* and deserves neither reward nor punishment. This view quotes in support the Qur'anic proclamation: 'And We never punish until We send a messenger' (al-Isrā', 17:15)

وما كنا معذبين حتى نبعث رسولا

which indicates that reward and punishment are based on the revealed law, not the human intellect. Elsewhere in the Qur'an, we also read, in a reference to the purpose of divine revelation, 'So that after the coming of messengers, mankind would have no plea against God' (al-Nisā', 4:165).

لئلا يكون للناس على الله حجة بعد الرسل

In yet another place the Qur'an affirms that punishment is imposed only after the people are duly warned but not before: in a reference to the disbelievers, the Qur'an thus proclaims: 'Had We inflicted on them a penalty before this [revelation], they would have said: Our Lord! If only you had sent us a messenger, we would have followed your signs' (Tā-Hā, 20:134).

ولو أنا أهلكناهم بعذاب من قبله لقالوا ربنا لولا أرسلنا

إلينا رسولا فنتبع آياتك

The Ash'arites maintain the view that the commands of the Lawgiver relate to the conduct of the *mukallaf* only after the advent of Islam and that prior to this event there is no basis for obligation. Infidelity (*kufri*) is not *harām*, nor is faith (*imān*) *wājib* before the revelation actually declares it so.⁵⁵

Secondly, the Mu'tazilah, that is the followers of Ibrāhīm al-Nazzām, have held the view that human intellect can identify the law of God regarding the conduct of the *mukallaf* even without the mediation of scriptures and messengers. The *shar'* only removes the curtain from what the *'aql* itself can perceive, and in essence the former is identical with the latter. The intellect (*'aql*) can identify the good and evil in human conduct by reference to its benefit and harm. God's law concerning the conduct of the *mukallaf* is not only identifiable by the human intellect but is also identical with the dictates of the human

intellect. God only asks the *mukallaf* to do what is beneficial and forbids him from doing what is harmful. Whatever the *'aql* sees as good or right, is also good in the sight of God, and vice versa. A person who acts against the requirement of reason may therefore be punished and one who acts in harmony with it may be rewarded. In this way, a person who has received no communication from the Lawgiver can still be considered a *mukallaf* and be held responsible on the basis of reason, and his punishment or reward can be determined accordingly. The Mu'tazilah assert that it is impossible for God to command something that is inherently evil or to prohibit something that is intrinsically good, which obviously means that *shar'* and *'aql* are always in agreement with one another.⁵⁶

The Mu'tazilah thus maintain that good and evil are inherent in the nature of things and the Qur'an confirms this: for example, God 'permits them the pure things and forbids them [from consuming] what is unclean' (al-A'rāf, 7:157).

ويحل لهم الطيبات ويحرم عليهم الخبائث

This implies that things were clean or unclean even before the revelation of the Qur'an, and that they did not acquire these qualities after their permissibility or prohibition. Similarly, when God Most High informed us that wine and gambling were unclean (*rijsun*) or that adultery was evil (*fāhishatun*), the same qualities were present in them even before the text declared them as such. The Mu'tazilah position here is generally acceded, and so is their view regarding the ability of the human intellect to perceive the good and evil in things. But this is only true, as Ibn Qayyim al-Jawziyya has observed, in a general sense, while the *Shar'i* provides the details. Human reason can thus usually perceive the good and evil in things, such as perceiving the beauty of justice, but is unable to determine whether this or that specific act is just or unjust without the aid of *shar'*. Human reason is thus incapable of providing specific and detailed guidance in all matters. When it is said that human reason can detect good and evil, this does not mean a total and absolute capacity, in the sense that it is liable to err and may be incorrect in its evaluation.

Al-Ghazālī is critical of the Mu'tazili view for its propensity to turn the determination of good and evil into a totally relative proposition. When an act is agreeable to one person and disagreeable to another, it is good from the viewpoint of the former and evil from that of the latter. Such a relativistic and circumstantial approach to good and evil

is totally unacceptable. The *Sharī'ah* does not and cannot operate on this basis. Instead, the *Sharī'ah* evaluates the acts and conduct of the *mukallaf* on an objective plane regardless of whether they agree or disagree with particular interests. When the Lawgiver commands an act, or when He praises it, it is praiseworthy and good in all cases.⁵⁷ Al-Shawkānī is also critical of the Mu'tazilī view, and highlights some of its weaknesses by saying that certain areas of human conduct are not amenable to rational evaluation. It is true that 'aql can determine the value, say, of truth and falsehood, as truth is beneficial and lying is harmful. 'Aql can also discern the value of saving the life of a drowning or of a starving man, yet it cannot determine the virtue of fasting on the last day of Ramaḍān or the enormity of fasting on the day that follows it. The good and evil in this case can only be determined by *shar'*, not by 'aql.⁵⁸ Most of the 'ibādāt, including ṣalāh and the pilgrimage of ḥajj, fall into this category. The human intellect may be able to perceive a value in them only because of a benevolence and grace (*luṭf*) therein which prevents obscenity and corruption; but 'aql alone is unable to assess the precise value of 'ibādāt.⁵⁹

The Mu'tazilī approach to the question of right and wrong embodies a utilitarian approach to jurisprudence in the sense that a good law is that which brings the greatest benefit to the largest number. Right and wrong are evaluated from the viewpoint of the benefit and harm that they entail to the person who acts upon it and to others. Acts that do not relate to this context are simply regarded as of no consequence; they are branded as 'abath, that is, totally 'in vain'.

Thirdly, the Māturīdīs, namely the followers of Abū Maṣṣūr al-Māturīdī (d. 333 AH) have suggested a middle course, which is adopted by the Hanafīs and considered to be the most acceptable. According to this view, right and wrong in the conduct of the *mukallaf* can indeed be ascertained and evaluated by the human intellect. But this does not necessarily mean that the law of God in regard to such conduct is always identical with the dictates of 'aql, for human intellect is liable to err. The knowledge of right and wrong must therefore be based on divine communication. This view basically combines the two foregoing opinions, but tends to lean more toward the Ash'arites in that the responsibility of the *mukallaf* is to be determined not with reference to the dictates of human reason but on the basis of the law as the Lawgiver has communicated it. 'Aql is capable of discerning good and evil, but this evaluation does not constitute the basis of reward and punishment, which is a matter solely determined by the Lawgiver. Whatever the Lawgiver has commanded is right, and merits

reward, and whatever He has forbidden is wrong and its perpetrator is liable to punishment. This view also agrees with that of the Mu'tazilī to the extent of its recognition that the inherent values of things are discernible by human intellect, which can perceive and detect values in the nature of things. The Māturīdīs, however, differ with the Mu'tazilī in that they hold that no reward or punishment can be granted on the basis of 'aql alone.⁶⁰

III.2 The Subject-Matter of *Hukm* (al-Maḥkūm Fih)

Maḥkūm fih denotes the acts, rights and obligations of the *mukallaf* that constitute the subject-matter of a command, prohibition or permissibility. When the ruling of the Lawgiver occurs in the forms of either *wājib* or *mandūb*, in either case the individual is required to act in some way. Similarly, when the *hukm* of the Lawgiver consists of a prohibition (*tahrim*) or abomination (*karāhah*), it is once again concerned with the conduct of the *mukallaf*. In sum, all commands and prohibitions are concerned with the acts and conduct of the *mukallaf*.

When the demand of the Lawgiver occurs in the form of a defining law (*al-hukm al-taklifi*) such as fasting, *jihād*, the payment of *zakāh*, etc., the subject-matter of the *hukm* is the act of the *mukallaf*. Similarly, when the demand of the Lawgiver occurs in the form of declaratory law (*al-hukm al-waḍ'i*), such as ablution (*wuḍū'*) being a condition of ṣalāh, or sale which is the cause (*sabab*) of ownership, or killing which is a hindrance (*man'ī*) to inheritance, the subject-matter of the *hukm* in all these consists of the act of the *mukallaf*.⁶¹ Occasionally, the *maḥkūm fih* does not consist of the conduct of the individual, but even then it is related to it. For example, the arrival of Ramaḍān which is the cause (*sabab*) of fasting is not an act of the individual, but is related to the latter in the sense that the effect (*musabbab*) of that cause, namely the fasting, consists of the act of the *mukallaf*. In order to constitute the subject-matter of a *hukm*, the following three conditions must apply.

(1) The individual must know the nature of the conduct so that he can perform what is required of him or refrain from that which is forbidden.⁶² An ambivalent text or a locution that does not impart this knowledge cannot constitute the basis of either a command or a prohibition. The ambivalent (*mujaḥmal*) text of the Qur'ān concerning ṣalāh, *zakāh* and ḥajj, for example, did not obligate anyone until these matters were explained and clarified by the Prophet. The manner in which these obligations were to be discharged was also explained in

precise terms. Furthermore, the 'ulamā' are in agreement that the necessary instruction or explanations must not be delayed and must be given in the time when they are needed, otherwise they will fail to provide the basis of obligation (*taklif*).

When we say that the individual must know the nature of the act he is required to do, this means that it should be possible for him to obtain such knowledge. Hence when a person is in full possession of his capacities and it is possible for him to learn the law, he is presumed to know his legal obligations. The law is therefore applied to him, and his ignorance of the rules of *Sharī'ah* is no excuse, for if actual knowledge by the individual were to be a requirement of the law, it would be very difficult to prove such knowledge in all cases of violation. It is therefore sufficient to ensure that the individual can acquire knowledge of the *Sharī'ah* either directly or by asking those who have such knowledge.

(2) The act that the individual is required to do must be within his capability, or, in the case of a prohibition, be within his capability to avoid. No law may thus demand something that is beyond the capacity of the individual. The principle here is clearly stated in the Qur'ān, which declares that 'God does not oblige a living soul beyond the limits of his capacity' (al-Baqarah, 2:286)

لا يكلف الله نفسا إلا وسعها

and that 'God puts no burden on any person beyond what He has given him' (al-Talāq, 65:7).

لا يكلف الله نفسا إلا ما آتاه

An act may be conceptually unfeasible, such as asking a person to be awake and asleep at the same time, or asking him to do and not to do something simultaneously. Likewise, an act may be physically impossible, such as ordering a person to fly without the necessary means. No one may be required to do the impossible, and it makes no difference whether the act is impossible by its nature or whether it is beyond the capacity of the individual in view of his particular conditions.⁶¹

A corollary of this rule is that no person may be obligated to act on behalf of another person or to stop another competent individual from acting, for this would be tantamount to asking a person to do the impossible. No one may therefore be legally obligated to pay the *zakāh* on behalf of his brother, or to perform the *ṣalāh* on behalf of

his father, or to prevent his neighbour from committing theft. All that one *mukallaf* may be lawfully expected to do in such situations is to give good advice (*naṣiḥah*) as part of his general duty to promote good and to prevent evil to the extent that this is possible for him as a law-abiding citizen.

Similarly, no-one may be obligated to do or not to do something in regard to which he has no choice, such as asking someone to act against his natural and biological functions. Thus when we read in the *ḥadīth* a command asking the Muslims to 'avoid anger [*lā taḡḥḍab*]', although the manifest (*ẓāhir*) terms of this *ḥadīth* demands avoidance of a natural phenomenon, what it really means is that the adverse consequences of uncontrolled anger which might lead to taking the law into one's own hands must be avoided. To give another example, the Qur'ān orders the believers 'not to despair over matters that have passed you by, nor to exult over the favours that are bestowed upon you' (al-Hadid, 57:23).

لكيلا تأسوا على ما فاتكم ولا تفرحوا بما آتاكم

Pleasure and despair are natural phenomena, and as such they are basically beyond the individual's control. What is really meant here is that one should avoid the consequences of despair such as violence against oneself or another person, and ensure that joy and happiness do not lead to arrogance and contemptuous behaviour. There is, of course, some hardship involved in all obligations. The kind of hardship that people can tolerate without prejudice or injury is not the aim. It is intolerable hardship that the *Sharī'ah* does not impose. The *Sharī'ah*, for instance, forbids continuous fasting (*ṣawm al-wiṣāl*), or staying up all night for worship. Furthermore, the *Sharī'ah* has granted certain concessions with a view to preventing hardship to individuals, and it is strongly recommended that they be utilised. This is the purport of the reminder contained in the *ḥadīth* that 'God loves to see that His concessions are taken advantage of, just as He hates to see the commission of a sin'.⁶²

إن الله يحب أن تؤتى رخصه كما يكره أن تؤتى معصيته.

In another *ḥadīth* we read an address to the believers, where they are asked to 'fulfil your duties to the extent of your ability'⁶³

خذوا من الأعمال ما تطيقون.

which obviously means that legal obligations are only operative within the limits of one's capacity.

A *hukm shar'i* may sometimes impose unusual hardship on the individual, such as the fulfilment of certain collective obligations like *jihād* (holy struggle) and *hisbah*, that is, the promotion of good and prevention of evil, under adverse conditions. *Jihād*, which requires the sacrifice of one's life, is undoubtedly onerous in the extreme, but it is deemed necessary and warranted in view of the values that are upheld and defended thereby.⁶⁶

(3) Lastly, the demand to act or not to act must originate in an authoritative source that can command the obedience of the *mukallaf*. This would mean that the *hukm* must emanate from God or His Messenger. It is mainly due to this requirement that the proof or evidence in which the law is founded must be identified and explained. Consequently, we find that in their juristic expositions, the *fuqahā'* normally explain the evidential basis (*hujjiyyah*) of the rules of *Shar'ah* that they expound, especially rules which are aimed at regulating the conduct of the *mukallaf*.⁶⁷

The next topic that needs to be discussed under the subject-matter of *hukm* is the division of rights into the two categories of *haqq Allāh* and *haqq al-'abd*.

The acts of the *mukallaf* may consist of either a right of God (*haqq Allāh*) or a right of man (*haqq al-'abd*), or of a combination of both. The right of God is called so not because it is of any benefit to God, but because it is beneficial to the community at large and not merely to a particular individual. It is, in other words, a public right and differs from the right of man, or private right, in that its enforcement is a duty of the state. The enforcement of a private right, on the other hand, is up to the person whose right has been infringed, and who may or may not wish to demand its enforcement.⁶⁸ The '*ulamā'* have further classified these rights into four main categories, which are as follows.

Firstly, acts that exclusively consist of the right of God, such as acts of devotion and worship, including *ṣalāh* and *jihād*, which are the pillars of religion and are necessary for the establishment of an Islamic order. These, which are often referred to as *huqūq Allāh al-khālīṣah*, or 'pure Rights of God', occur in eight varieties:

(a) Rights of God which consist exclusively of worship, such as professing the faith (*imān*), *ṣalāh*, *zakāh*, the pilgrimage and *jihād*.

(b) Rights which consist of both worship and financial liability (*ma'ūnah*), such as charity given on the occasion of '*id al-fiṭr*', marking the end of Ramaḍān.

(c) Rights in which financial liability is greater than worship, like the tithe that is levied on agricultural crops.

(d) Rights of God which consist of financial liability but have a propensity toward punishment, such as the imposition of *kharaḥ* tax on land in the conquered territories.

(e) Rights which consist of punishment only, like the *hudūd*, that is, the prescribed penalties for theft and adultery, and so forth.

(f) Rights which consist of minor punishment ('*uqūbah qāṣirah*'), such as excluding the murderer from the inheritance of his victim. This is called '*uqūbah qāṣirah*' on account of the fact that it inflicts only a financial loss.

(g) 'Punishments which lean toward worship', such as the penances (*kaffārāt*).

(h) Exclusive rights, in the sense that they consist of rights alone and are not necessarily addressed to the *mukallaf*, such as the community right to mineral wealth or to the spoils of war (*ghana'im*).⁶⁹

Secondly, acts that exclusively consist of the rights of men, such as the right to enforce a contract, or the right to compensation for loss, the purchaser's right to own the object he has purchased, the vendor's right to own the price paid to him, the right of pre-emption (*shuf'*) and so on. To enforce such rights is entirely at the disposal of the individual concerned; he may demand them or waive them, even without any consideration.

Thirdly, acts in which the rights of the community and those of individuals are combined, while of the two the former preponderate. The right to punish a slanderer (*qadhif*) belongs, according to the Ḥanafīs, to this class by reason of the attack made on the honour of one of its members. Since the right of God is dominant in *qadhif*, the victim of this offence (i.e. the *maḍḥūf*) cannot exonerate the offender from punishment. The Shāfi'īs have, however, held the contrary view by saying that *qadhif* is an exclusive right of man and that the person so defamed is entitled to exonerate the defamer. All acts that aim to protect human life, intellect and property fall into this category. To implement consultation (*shūrā*) in public affairs is one example, or the right of the individual in respect of *bay'ah* in electing the head of state. According to the Māliki jurist al-Qarāfi, all rights in Islam partake of the right of God in the exclusive sense that there is no right whatsoever without the *haqq Allāh* constituting a part thereof. Thus when a person buys a house, he exercises his private right insofar as it benefits him, but the transaction partakes of the right of God insofar as the buyer is liable to pay the purchase price. The basic criterion of

distinction between the right of God and the right of man is whether it can be exempted by the individual or not. Thus the vendor is able to exonerate the purchaser from paying the price, and a wife is able to exonerate her husband from paying her a dower (*mahr*), but the individual cannot exonerate anyone from obligatory prayers, or from the payment of *zakaḥ*.⁷⁰

Fourthly, there are matters in which public and private rights are combined but where the latter preponderate. Retaliation (*qisās*) and blood-money (*diyyah*) of any kind, whether for life or for grievous injury, fall into this category of rights. The community is entitled to punish such violations, but the right of the heirs in retaliation and in *diyyah* for erroneous killing, and the right of the victim in respect of *diyyah* for injuries, is preponderant in view of the grievance and loss that they suffer as a result. The guardian (*walī*) of the deceased, in the case of *qisās*, is entitled to pardon the offender or to accept compensation from him. But the state, which represents the community, is still entitled to punish the offender through a *ta'zīr* punishment even if he is pardoned by the relatives of the deceased.⁷¹

III.3 Legal Capacity (*Ahliyyah*)

Being the last of the three pillars (*arkān*) of *ḥukm shar'ī* this section is exclusively concerned with the legal capacity of the *maḥkūm 'alayh*, that is, the person to whom the *ḥukm* is addressed, and it looks into the question of whether he is capable of understanding the demand that is addressed to him and whether he comprehends the grounds of his responsibility (*taklīf*). Since the possession of the mental faculty of '*ʿaql*' is the basic criterion of *taklīf*, the law concerns itself with the circumstances that affect the sanity and capacity of the individual, such as minority, insanity, duress, intoxication, interdiction (*ḥajr*) and mistake.

Legal capacity is primarily divided into two types: the capacity to receive rights and obligations, referred to as *ahliyyah al-ʾiṣṭibāṭ*, and the capacity for the active exercise of rights and obligations, which is referred to as *ahliyyah al-ʾadāʾ*. The former may be described as 'receptive legal capacity', and the latter as 'active legal capacity'.⁷²

Every person is endowed with legal capacity of one kind or another. Receptive legal capacity is the ability of the individual to receive rights and obligations on a limited scale, whereas active legal capacity enables him to fulfil rights and discharge obligations, to effect valid acts and transactions and to bear full responsibility towards God and his

fellow human beings. The criterion of the existence of receptive legal capacity is life itself, whereas the criterion of active legal capacity is maturity of intellect. Receptive legal capacity is vested in every human being, competent or otherwise: an insane person, a foetus in the womb, a minor and a foolish person (*sāfilh*), whether in good health or in illness – all possess legal capacity by virtue of their dignity as human beings.⁷³

Active legal capacity is only acquired upon attaining a certain level of intellectual maturity and competence. Only a person who understands his acts and his words is competent to conclude a contract, discharge an obligation, or be punished for violating the law. Active legal capacity, which is the basis of responsibility (*taklīf*) is founded on the capacity of the mind to understand and to discern. But since intelligence and discernment are hidden qualities that are not readily apparent to the senses, the law has linked personal responsibility with the attainment of the age of majority (*bulūgh*), which is an obvious phenomenon and can be established by factual evidence. However, it is the intellectual faculty of the individual rather than age as such which determines his legal capacity. This is why an adult who is insane, or an adult of any age who is asleep, is not held responsible for his conduct. The principle here is clearly stated in the *ḥadīth* stating that: 'The pen is lifted from three persons: the one who is asleep until he wakes; the child until he attains puberty; and the insane person until he regains sanity.'⁷⁴

رفع القلم عن ثلاثة : عن النائم حتى يستيقظ ، وعن الصبي حتى يجتلم ، وعن المجنون حتى يعقل .

Receptive legal capacity may either be 'deficient' or 'complete'. The receptive legal capacity of a child in the womb is incomplete in the sense that it can only receive certain rights, such as inheritance and bequest, but cannot bear any obligation toward others. Receptive legal capacity is complete when a person can both have rights and bear obligations. This type of legal capacity is acquired by every human being as of the moment of birth. During its infancy and later stages of childhood, a child is capable of discharging, albeit through his guardian, certain obligations in respect, for example, of maintenance, liability for loss (*ḍamān*) and payment for services rendered to him.

As for the active legal capacity, three possible situations are envisaged. First, a person may be totally lacking in active legal capacity, as in the

case of a child during infancy or an insane person of any age. Since neither is endowed with the faculty of intellect, no legal consequences accrue from their words and acts. When a child or a madman kills someone or destroys the property of another person, they can only be held liable with reference to their property, but not to their persons. They cannot be subjected, for example, to retaliation or to any other type of punishment.

Secondly, a person may be partially lacking in active legal capacity. Thus a discerning child (*al-sābi al-mumayyiz*), that is, a child between seven and fifteen years of age, or a mentally disabled person (*ma'tūh*) who is neither insane nor totally lacking in intellect but whose intellect is defective and weak, possess a legal capacity that is deficient. Both possess an active legal capacity which is incomplete and partial.⁷⁵ The discerning child and the mentally disabled person are capable only of concluding acts and transactions that are totally to their benefit, such as accepting a gift or charity, even without the permission of their guardians. But if the transaction in question is totally disadvantageous to them, such as giving a gift or making a will, or pronouncing a divorce, these are not valid at all even if their guardians happen to approve of them. As for transactions which partake of both benefit and loss, they are valid but only with the permission of the guardian (*walī*), otherwise they are null and void.

Thirdly, active legal capacity is complete upon the attainment of intellectual maturity. Hence every major person who has acquired this ability is presumed to possess active legal capacity unless there is evidence to show that he or she is deficient of intellect or insane.

Persons who are fully competent may sometimes be put under interdiction (*hajr*) with a view to protecting the rights of others. A person may be interdicted by means of a judicial order which might restrict his powers to conclude certain transactions. A debtor may thus be interdicted so that the rights of his creditors may be protected.

A person in his death-illness (*marad al-mawt*) is also deficient of legal capacity, as severe illness and fear of imminent death affect the physical and mental faculties of the individual. But ordinary illness and other conditions that do not impair the intellectual capacity of a person have no bearing on his active legal capacity. This is partly why Imam Abū Ḥanīfah has differed with the majority of jurists by holding the view that foolishness (*safāhah*), indebtedness and carelessness (*ghaflah*) do not affect the active legal capacity of a person. Abū Ḥanīfah refuses to accept these as proper grounds of interdiction, as in his view the benefit of interdiction in these cases is far outweighed by its possible harm.⁷⁶

NOTES

1. Ghazālī, *Mustaṣfā*, I, 41; Shawkānī, *Ishād*, p. 6; Khallāf, 'Ilm, p. 100.
2. Muslim, *Sahih*, p. 16, *hadith* no. 34.
3. Shāfi'i, *Risalah*, p. 80; Ibn Mājah, *Sunan*, II, 913, *hadith* no. 1735.
4. Khallāf, 'Ilm, p. 100; Khudārī, *Uṣūl*, p. 18; Abū 'Id, *Mabāhith*, p. 58.
5. Cf. Abdur Rahim, *Jurisprudence*, p. 193, for the use of English terminology.
6. Khallāf, 'Ilm, p. 101; Qāsim, *Uṣūl*, p. 113.
7. Abū 'Id, *Mabāhith*, p. 63; Qāsim, *Uṣūl*, p. 216; Abdur Rahim, *Jurisprudence*, p. 197.
8. Abū Zahrah, *Uṣūl*, pp. 23-4; Abū 'Id, *Mabāhith*, p. 63.
9. Ghazālī, *Mustaṣfā*, I, 42.
10. Khallāf, 'Ilm, p. 109; Qāsim, *Uṣūl*, p. 208; Abū 'Id, *Mabāhith*, p. 69.
11. The Mu'tazilah have held the view that a flexibility of this kind negates the whole concept of *uṣūb*, as in their view *uṣūb* precludes the element of choice altogether. But the majority of 'ulamā' refute this by saying that there is no necessary contradiction in dividing the *uṣūb* into *uṣūb muwaqqat* and *uṣūb mutlaq*. For details see Ghazālī, *Mustaṣfā*, I, 43-4.
12. Khudārī, *Uṣūl*, p. 33; Khallāf, 'Ilm, p. 108.
13. Ghazālī, *Mustaṣfā*, I, 47; Khallāf, 'Ilm, p. 110; Abū Zahrah, *Uṣūl*, p. 35; Khudārī, *Uṣūl*, p. 42.
14. Ghazālī, *Mustaṣfā*, I, 47.
15. Cf. Hasan, *Jurisprudence*, pp. 68ff.
16. Ghazālī, *Mustaṣfā*, I, 46; Abū Zahrah, *Uṣūl*, p. 23.
17. Ghazālī, *Mustaṣfā*, I, 42.
18. Ghazālī, *Mustaṣfā*, I, 42; Khallāf, 'Ilm, p. 112; Abdur Rahim, *Jurisprudence*, p. 197.
19. Abū 'Id, *Mabāhith*, p. 71; Khudārī, *Uṣūl*, p. 46.
20. Tabrizī, *Mishkāt*, I, 168, *hadith* no. 540.
21. Ghazālī, *Mustaṣfā*, I, 48; Abū 'Id, *Mabāhith*, pp. 72-4; Qāsim, *Uṣūl*, p. 322.
22. Qāsim, *Uṣūl*, p. 225; Badrān, *Uṣūl*, p. 274; Abū 'Ubayd, *Mabāhith*, p. 82.
23. Muslim, *Sahih*, p. 473, *hadith* no. 1775.
24. Bayhaqī, *Sunan al-Kubrā*, III, 10.
25. Khallāf, 'Ilm, p. 113; Abū Zahrah, *Uṣūl*, p. 34; Abū 'Id, *Mabāhith*, pp. 70ff.
26. Abū Zahrah, *Uṣūl*, p. 35; Qāsim, *Uṣūl*, pp. 226ff.
27. Abū Zahrah, *Uṣūl*, p. 34.
28. Badrān, *Uṣūl*, p. 274; Abū 'Ubayd, *Mabāhith*, p. 82; Abū Zahrah, *Uṣūl*, p. 36.
29. Tabrizī, *Mishkāt*, I, 330, *hadith* no. 1047.
30. Ibid., II, 978, *hadith* no. 3280; Abū 'Id, *Mabāhith*, p. 80.
31. Tabrizī, *Mishkāt*, II, 845, *hadith* no. 2773.
32. Qāsim, *Uṣūl*, p. 225.
33. Abū Dāwūd, *Sunan*, III, 1133, *hadith* no. 4046.
34. Ibid., II, 556, *hadith* no. 2075.
35. Abū 'Id, *Mabāhith*, pp. 80-2; Khallāf, 'Ilm, p. 116; Aghnides, *Muhammadian Theories*, p. 89.
36. Ghazālī, *Mustaṣfā*, I, 42; Khallāf, 'Ilm, p. 115; Abdur Rahim, *Jurisprudence*, p. 198.
37. Abū 'Id, *Mabāhith*, pp. 84-8.
38. Ghazālī, *Mustaṣfā*, I, 42.

39. Shāḥibī, *Muwāḥḥaḍ*, I, 140ff; Ahmad Hasan, *Jurisprudence*, pp. 148ff; Zubayrī, *Uṣūl*, p. 86.
40. Abū Dāwūd, *Sunan*, II, 557, *ḥadīth* no. 2078.
41. Abū Dāwūd, *Sunan*, II, 808, *ḥadīth* no. 2864.
42. Shāfi'ī, *Risalah*, p. 80; Ibn Mājah, *Sunan*, II, 913, *ḥadīth* no. 2735.
43. Khallāf, 'Ilm, p. 102; Abū 'Id, *Mabāḥith*, p. 60.
44. Abdur Rahim, *Jurisprudence*, p. 62.
45. Cf. Khallāf, 'Ilm, p. 104.
46. Qāsim, *Uṣūl*, p. 228; Abū 'Id, *Mabāḥith*, p. 105.
47. Shawkānī, *Ishād*, p. 6; Khallāf, 'Ilm, p. 118; Abū 'Id, *Mabāḥith*, p. 92.
48. Khallāf, 'Ilm, p. 118; Abū 'Id, *Mabāḥith*, pp. 96-9; Qāsim, *Uṣūl*, p. 231.
49. Khallāf, 'Ilm, p. 120; Abū 'Id, *Mabāḥith*, p. 101.
50. Aghrīdes, *Muhammedan Theories*, pp. 85ff; Abū 'Id, *Mabāḥith*, p. 104.
51. Ghazālī, *Mustaḥḍā*, I, 62-3.
52. Abū Zahrah, *Uṣūl*, p. 50; Abū 'Id, *Mabāḥith*, pp. 106-12.
53. Abū Zahrah, *Uṣūl*, pp. 51-2; Abū 'Id, *Mabāḥith*, pp. 103-4; Qāsim, *Uṣūl*, pp. 236-8.
54. Ghazālī, *Mustaḥḍā*, I, 53; Abū Zahrah, *Uṣūl*, p. 54.
55. Shawkānī, *Ishād*, p. 7; Abū Zahrah, *Uṣūl*, pp. 57ff; Khallāf, 'Ilm, p. 97.
56. Ghazālī, *Mustaḥḍā*, I, 36; Khallāf, 'Ilm, p. 98; Abū 'Id, *Mabāḥith*, p. 121.
57. Ghazālī, *Mustaḥḍā*, II, 136.
58. Shawkānī, *Ishād*, p. 7.
59. Ghazālī, *Mustaḥḍā*, I, 36.
60. Abū Zahrah, *Uṣūl*, p. 56; Khallāf, 'Ilm, p. 99; Abū 'Id, *Mabāḥith*, p. 123; Qāsim, *Uṣūl*, pp. 239-43.
61. Khallāf, 'Ilm, p. 128; Abū Zahrah, *Uṣūl*, p. 249.
62. Knowledge in this context means understanding the nature of a command or a prohibition by the individual to the extent that he can act upon it. It does not mean affirmation of the mind (*taḍdīq*), for if this were to be a requirement, the unbelievers would have been excluded from the meaning of *mukallaf*, which they are not. See Shawkānī, *Ishād*, p. 11.
63. Shawkānī, *Ishād*, p. 11; Khallāf, 'Ilm, p. 128ff; Abū Zahrah, *Uṣūl*, 250ff.
64. Ibn Ḥanbal, *Musnad*, II, 108.
65. Muslim, *Ṣaḥīḥ*, p. 104, *ḥadīth* no. 378.
66. Cf. Abū 'Id, *Mabāḥith*, p. 139.
67. Abdur Rahim, *Jurisprudence*, p. 202; Abū Zahrah, *Uṣūl*, p. 256ff.
68. Khallāf, 'Ilm, p. 128; Abū 'Id, *Mabāḥith*, p. 128.
69. Abū Sinnah, *Naḥḥarīyah al-Haqīq*, p. 179; Abū 'Id, *Mabāḥith*, pp. 141ff.
70. Ibid., p. 181.
71. Abū Zahrah, *Uṣūl*, p. 257; Abū 'Id, *Mabāḥith*, p. 145.
72. Cf. Abdur Rahim, *Jurisprudence*, p. 217.
73. Khallāf, 'Ilm, p. 136.
74. Tabrizī, *Mishkāt*, II, 980, *ḥadīth* no. 3287.
75. An idiot (*ma'ālū*) is a person who is markedly defective of understanding. A foolish and reckless person (*sāfiḥ*) is also regarded as being of defective legal capacity to a lesser degree than the *ma'ālū*. Cf. Abdur Rahim, *Jurisprudence*, p. 240.
76. Khallāf, 'Ilm, p. 140; Abdur Rahim, *Jurisprudence*, p. 220.

CHAPTER EIGHTEEN

Conflict of Evidences

Conflict (*ta'arūf*) occurs when each of two evidences of equal strength requires the opposite of the other. This means that if one of them affirms something, the other negates it at the same time and place. A conflict is thus not expected to arise between two evidences of unequal strength as, in this case, the stronger of the two evidences will naturally prevail. Thus a genuine conflict cannot arise between a definitive (*qaf'i*) and a speculative (*ẓannī*) evidence, nor could there be a conflict between the *naṣṣ* and *ijmā'*, or between *ijmā'* and *qiyās*, as some of these are stronger than others and will prevail over them. A conflict may, however, be encountered between two texts of the Qur'ān, or between two rulings of *ḥadīth*, or between a Qur'ānic *āyah* and a *mutawātir ḥadīth*, or between two non-*mutawātir ḥadīth*, or between two rulings of *qiyās*. When there is a conflict between two Qur'ānic *āyāt*, or between one *ḥadīth* and a pair of *ḥadīth*, or between one *qiyās* and a pair of analogies, it is a case of conflict between equals, because strength does not consist in number, and consequently a single *āyah*, *ḥadīth* or *qiyās* is not necessarily set aside to make room for the pair. The strength of two conflicting evidences is determined by reference to the evidence itself or to the extraneous/additional factors that might tip the balance in favour of the one over the other. For example, of the two conflicting solitary or *āḥād ḥadīth*, the one that is narrated by a *ḥaḍīṭh* is considered to be stronger than that which is narrated by a non-*ḥaḍīṭh*.¹

Conflicts can only arise between two evidences that cannot be reconciled, in the sense that the subject-matter of one cannot be distinguished from the other, nor can they be so distinguished in respect

of the time of their application. There are, for example, three different rulings in the Qur'an on wine-drinking, but since they were each revealed one after the other, and not simultaneously, there is consequently no case of conflict between them. Similarly, if investigation reveals that each of two apparently conflicting rules can be applied to the same issue under a different set of circumstances, then once again there will be no conflict.

A genuine conflict can arise between two speculative (*ẓannī*) evidences, but not between definitive (*qat'ī*) proofs. In this way, all cases of conflict between the definitive rulings of the Qur'an and *Sunnah* are deemed to be instances of apparent, not genuine, conflict. Furthermore, the 'ulamā' have maintained the view that a genuine conflict between two *āyāt* or two *ahādīth*, or between an *āyah* and a *hadīth*, does not arise; whenever a conflict is observed between these proofs, it is deemed to be only apparent and lacking in reality and substance. For the all-pervasive wisdom of the Lawgiver cannot countenance the enactment of contradictory laws. It is the *mujtahid* who is deemed unable to envision the purpose and intention of the Lawgiver in its entirety, and who may therefore find cases of apparent conflict in the divinely-revealed law. Only in cases of evident abrogation (*naskh*), which are largely identified and determined by the Prophet himself, could it be said that a genuine conflict had existed between the rulings of the *nuṣūṣ*, one must try to discover the objective of the Lawgiver and remove the conflict in the light of that objective. Indeed, the rules of reconciliation and preference proceed on the assumption that no genuine conflict can exist in the divine laws; hence it becomes necessary to reconcile them or to prefer one over the other. This would mean that either both or at least one of the evidences at issue can be retained and implemented. The *mujtahid* must therefore try to reconcile them as far as possible, but if he reaches the conclusion that they cannot be reconciled, then he must attempt to prefer one over the other. If the attempt at reconciliation and preference fails, then one must ascertain whether recourse can be had to abrogation, which should be considered as the last resort. But when abrogation also fails to offer a way out of the problem, then action must be suspended altogether and both of the conflicting texts are abandoned.³

A case of conflict between the *nuṣūṣ* and *ijmā'*, or between two rulings of the latter, is inconceivable for the obvious reason that no *ijmā'* can be concluded if it is contrary to the Qur'an and *Sunnah* in the first place. Should a conflict arise between two analogies or proofs

other than the *nuṣūṣ* and *ijmā'*, and neither can be given preference over the other and they cannot be reconciled, both must be suspended. Abrogation in this case does not offer an alternative course of action. For abrogation is basically confined to the definitive rulings of the Qur'an and *Sunnah*; it is irrelevant to *ijmā'* and can be of little help in cases of conflict between speculative evidences.

Among the many instances of abrogation that the 'ulamā' have identified in the Qur'an, we may refer to only two; but in both cases a closer analysis will show that the conflict at issue is not genuine. Our first illustration is concerned with the precise duration of the waiting period ('*iddah*') of widows. According to one of the two *āyāt* on this subject (al-Baqarah, 2:234), the widow must observe a '*iddah*' of four months and ten days following the death of her husband. This *āyah* consists of a general provision that applies to every widow regardless of whether she is pregnant or not at the time her husband dies. But elsewhere in the Qur'an, there is another ruling concerning the '*iddah*' of pregnant women. This *āyah* (al-Talāq, 65:4) also conveys a general ruling to the effect that the '*iddah*' of pregnant women continues until the delivery of the child. This ruling also applies to a pregnant widow, who must wait until the termination of her pregnancy. Thus a pregnant woman whose husband dies and who gives birth to a child on the same day would have completed her '*iddah*' according to the second of the two rulings, whereas she must, under the first ruling, still wait for four months and ten days. The two texts thus appear to be in conflict regarding the '*iddah*' of a pregnant widow.

For a second illustration of an apparent conflict in the Qur'an, we refer to the two texts concerning the validity of making a bequest to one's relatives. This is explicitly permitted in sūrah al-Baqarah (2:180) which provides: 'It is prescribed, when death approaches any of you, if he leaves any assets, that he makes a bequest to his parents and relatives.'

إذا حضر أحدكم الموت إن ترك خيراً الوصية للوالدين والأقربين بالمعروف

This ruling is deemed to have been abrogated by another text (al-Nisā', 4:11) which prescribes for each of the close relatives a share in inheritance. This share is obviously determined, not by the will of the testator, but by the will of God. The two texts thus appear to be in conflict, but the conflict is not genuine as they can be reconciled, and both can be implemented under different circumstances. The first of

the two rulings may, for example, be reserved for a situation where the parents of the testator are barred from inheritance by a disability such as difference of religion. Since the parents in this case would be excluded from the scope of the second *āyah*, the conflict would consequently not arise and there would be no case for abrogation. The same approach can be taken regarding the foregoing *āyah* on the waiting period of widows. Whereas the first of the two texts prescribed the *‘iddah* of widows to be four months and ten days, the second enacted the *‘iddah* of pregnant women until the termination of pregnancy. The two texts could be reconciled if widows were to observe whichever of the two periods were the longer. If the pregnant widow delivers her child before the expiry of four months and ten days following the death of her husband, then she should wait until this period expires. But if she waits four months and ten days and has still not delivered the child, then her *‘iddah* should continue until the birth of the child. Thus the apparent conflict between the *āyah* under discussion is removed by recourse to specification (*takhsīṣ*): the second *āyah* in this case specifies the general ruling of the first insofar as it concerns pregnant widows.⁴

The majority of *madhāhib*, excluding the Hanafis, thus apply a four-tiered procedure that begins with reconciliation and harmonising (*al-jam‘ wa’l-tauḥīṣ*), whereby both evidences are reconciled and retained. The process that is applied here is known as differentiation (*al-tamwīṣ*) and it means reconciling the general with the specific, the absolute with the qualified, and the literal with the metaphorical; or applying methods of interpretation in such a way that each is applied in its respective capacity and scope without any attempt to overrule either. If reconciliation proves to be unfeasible, then recourse will be had to preference (*al-tarjīh*), in which case, as already indicated, only one of the two evidences is retained in preference to the other. *Tarjīh* may also be based on the value that is conveyed by one or the other of the evidences. In this way prohibition is preferred to permissibility and the affirmative is preferred to the negative (or vice versa, according to some *‘ulamā’*). *Tarjīh* may also be based on extraneous evidence, such as support that may be obtained for one of the evidences from another source such as the Qur’ān or *ijmā‘*. The third step is to resort to abrogation (*naskh*) when *tarjīh* proves unfeasible. *Naskh* can only apply when the conflicting evidences are equal in all respects, in which case the latest in time abrogates the earlier. And lastly, when all three steps prove unfeasible, recourse may be had to suspension of both evidences (*taṣāquṭ al-dalīlayn*), which means that no action is taken on either.

The Hanafis differ with the majority only on the order in which the four steps are taken. The Hanafi order thus begins with *naskh*, which is followed by reconciliation, then *tarjīh*, and lastly suspension of both evidences (although some Hanafis resort to *tarjīh* before reconciliation).⁵ Two of these steps, namely reconciliation and preference, will be explained in further detail below.

To reconcile two evidences, both of which are general (*‘āmm*), one may distinguish the scope and subject-matter of their application from one another by recourse to allegorical interpretation (*ta’wīl*). Supposing there were two conflicting orders on *ṣalāh*, one providing that *‘ṣalāh* is obligatory on my *ummah*⁶ and the other that *‘ṣalāh* is not obligatory on my *ummah*⁷, to reconcile these two, one may assume the first to have contemplated the adult and competent members of the community and the second the minors and lunatics. If this is not possible, then the two rulings may be distinguished in regard to the times of their respective application, or they might be assumed to have each envisaged a different set of circumstances. It is possible that one or both of the two rulings are in the nature of a manifest (*ẓāhir*) provision and may thus be open to *ta’wīl*. The *ẓāhir* may be given an interpretation other than that of its obvious meaning so as to avoid a clash. This may be illustrated by the two apparently conflicting *ḥadīth* on the subject of testimony. In the first of the two reports, the Prophet is quoted to have addressed an audience as follows: ‘Should I inform you who makes the best of witnesses?’ To this, the audience responded, ‘Yes, O Messenger of God’, and the Prophet said, ‘It is one who gives testimony before he is requested to do so.’⁸

ألا أخبركم بخير الشهود؟ قالوا بلى يا رسول الله، قال :
الذي يأتي بشهادته قبل أن يسأله.

However, according to another *ḥadīth*, the Prophet said: ‘The best generation is the one in which I live, then the generation after that and then the next one, but after that there will be people who will give testimony although they are not invited to give it.’⁹

خير القرون قرني ثم الذين يلونهم، ثم الذين يلونهم،
ثم إن بعدهم قوما يشهدون ولا يستشهدون.

Thus the first *ḥadīth* recommends something that the second seems to

discourage. The best form of testimony in the first *ḥadīth* is unsolicited testimony, whereas this is frowned upon in the second. Since neither of the two *ḥadīth* have specified a particular context, it is suggested by way of *ta'wīl* that the first *ḥadīth* contemplates the rights of God (*ḥuqūq Allāh*) whereas the second *ḥadīth* contemplates the rights of men (*ḥuqūq al-'ibād*). In this way, the apparent conflict between the two texts is removed through an allegorical interpretation.⁸

Allegorical interpretations may offer a solution even in cases where two conflicting orders are both specific (*khāṣṣ*). Recourse to *ta'wīl* in this case would once again serve the purpose of distinguishing the subject-matter and scope of each of the two conflicting orders. For example, if Aḥmad issues two orders to his employee, one of which tells the latter to 'pay 1,000 dinars to Zayd' and the other says 'do not pay 1,000 dinars to Zayd', then if circumstances would so permit, the first order may be assumed to have contemplated normal relations between Zayd and Aḥmad while the second had envisaged a hostile situation between the two parties.⁹

In the event where one of the two conflicting rulings is general (*'āmm*) and the other specific (*khāṣṣ*), they can be reconciled by excepting the latter from the scope of the former through a procedure which is known as *takhsīṣ al-'Amm*, that is, 'specifying a part of the general'. This would once again mean that each of the two rulings applied separately from one another to a different subject-matter, and both can remain operative. Similarly, a text may be absolute in its wording and appear to be in conflict with another text. They could be reconciled and the conflict between them removed if one of them is so interpreted as to limit and qualify the absolute terms of the other. Examples to illustrate these and other methods of interpretation can be found in the separate chapter of this work devoted to the rules of interpretation.

Should the attempt at reconciliation fail, the next step in resolving a conflict, as stated above, is to give preference to one over the other. Investigation may reveal that one of the two texts is supported by stronger evidence, in which case we are basically dealing with two texts of unequal strength. To prefer the one over the other in this case may even amount to a form of clarification or explanation of one by the other. Inequality in strength may be in content (*matn*) or in proof of authenticity (*riwāyah*). The former is concerned with the clarity or otherwise of the language of the text, and the latter with the historical reliability of the transmitters. Preference on the basis of content would require that the literal is preferred to the metaphorical,

the clear (*ṣarīḥ*) to the implicit (*kināyah*), the explicit meaning (*'iḥrāḥ al-naṣṣ*) to the allusive meaning (*ishārah al-naṣṣ*), and the latter is preferred to the inferred meaning of the text (*dālālah al-naṣṣ*). Similarly, words that convey greater clarity are to be preferred to those that are less clear. Thus the *mubḥam* (perspicuous) will be preferred to the *mufassar* (unequivocal), the latter to the *naṣṣ* (explicit) and the *naṣṣ* to the *ẓāhir* (manifest). Among unclear words, the *khafī* (obscure) takes priority over the *mushkil* (difficult), the latter over the *muǧmal* (ambivalent) and the *muǧmal* over the *mutashābih* (intricate), in an order of priority which again has been stated elsewhere under the rules of interpretation.

Inequality in respect of transmission is mainly concerned with the *ḥadīth*: when, for example, the *mutawātir* is compared to the *mashhūr*, the former is preferred to the latter. Similarly the *mashhūr* takes priority over the solitary (*āḥād*) *ḥadīth*, and the report of a transmitter who is a *faqīh* is preferred to the report of a transmitter who is not. Reports by persons who are known to be retentive of memory take priority over those transmitted by persons whose retentiveness is uncertain. On a similar note, *ḥadīth* that are transmitted by leading Companions are given preference to those transmitted by Companions who are less well known for their prominence and continuity of contact with the Prophet. Similarly, a *ḥadīth* that is reported by a large number of reporters is preferred to one reported by a smaller number; and one reported by an upright person among the Sunnis is preferred to one reported by a follower of a heterodox sect. And then, a report by one who embraced Islam earlier is preferred to one compiled by a late-comer to the faith. A *ḥadīth* transmitted by an adult who also received it while an adult, is preferred to one that was received during childhood. Any element of doubt, for instance concerning the name and identity of a reporter, his retentiveness of memory and whether he delivered the *ḥadīth* during full or impaired mental capacity, will be counted among the factors that determine the strength of a *ḥadīth*. The Mālikis on the other hand prefer a *ḥadīth* that is in agreement with the practice of the people of Medina over one that is not. Similarly, the report of a transmitter who is directly involved in an incident is preferable to other reports. Thus the *ḥadīth* that is reported by the Prophet's wife Maymūnah to the effect that the Prophet married her while both of them were *ḥalāl*, that is, outside the sacred state of *iḥrām* for the *ḥajj* ceremonies, is preferred to that of Ibn 'Abbās to the effect that the Prophet married Maymūnah while he was in the sacred state of *iḥrām*.¹⁰ In this way, a *ḥadīth* that is supported by a more reliable

chain of transmission is preferred to a *ḥadīth* that is weak in its proof of authenticity.

At times the *mujtahid* may be confronted with a situation where each of the two conflicting *ḥadīth* is stronger in respect of some of these factors but weaker in regard to others, in which case it is for the *mujtahid* to assess and determine the overall strength or weakness of the *ḥadīth* according to his own *iftihād*.

The 'ulamā' of *ḥadīth* are in agreement that a *ḥadīth* reported by all the six imams of *ḥadīth*, namely al-Bukhārī, Muslim, Abū Dawūd, al-Nasā'ī, al-Tirmidhī and Ibn Mājah, takes priority over that which might have been reported by only some and not all of these authorities. Among *ḥadīth* that are not reported by all the six authorities, those that are reported by the first two are preferred, and if one of the two conflicting *ḥadīth* is reported by al-Bukhārī and the other by Muslim, the former is preferred to the latter. A *ḥadīth* with a shorter chain of transmitters is preferred to one with a longer chain of *isnād*. This is because the one with the fewer number of transmitters is closer to its source and more reliable. Similarly, reports of a transmitter who knows Arabic well is preferable to those whose transmitter has poor knowledge of Arabic. And then, a report by a transmitter who is not involved in sectarian disputes is preferred to the one who is. The 'ulamā' of *ḥadīth* also consider a *ḥadīth* that was pronounced in Medina preferable to the ones that were pronounced in Mecca. Also a report that conveys its purpose directly is preferred to one that is indirect. An eloquent and well-constructed report is preferred to one which is poorly structured; this is because the prophetic language is distinguished for its clarity and eloquence.¹¹

Another rule of preference, as noted above, is that affirmative evidence takes priority over negative. This is because affirmation is more indicative of superior knowledge. This may be illustrated by the two rulings of *ḥadīth* concerning the right of a slave-woman to a divorce upon her release from slavery. It is reported that a slave woman by the name of Barīrah was owned by 'Ā'ishah and was married to another slave, Mughīth. 'Ā'ishah set her free, and she wanted to be separated from Mughīth, who was still a slave. The case was brought to the attention of the Prophet, who gave Barīrah the choice either to remain married to Mughīth or be separated. But a second report on the same subject informs us that Barīrah's husband was a free man when she was emancipated. The two reports are thus conflicting with regard to the status of the husband. But since it is known for certain that Mughīth was originally a slave, and there is no dispute about this,

the report that negates this original state is therefore ignored in view of the general rule that affirmative evidence, that is, evidence which affirms continuation of the original state takes priority over that which negates it. The jurists have consequently held that when a slave woman is set free while married to a slave, she will have the choice of repudiating or retaining the marriage. If the husband is a free man, she will have no such choice according to Mālik, Shāfi'i and the majority of scholars. Abū Hanīfah, however, maintains that she will have the option even when her husband is a free man.¹²

Among two conflicting *ḥadīth*, the one that explains its own effective cause ('illah) or occasion for its ruling is preferred to the one that may contain the same ruling but is silent as to its 'illah. A *ḥadīth* is likewise preferred if it contains additional elements to the one that does not. This is because including additional information implies superior knowledge. The addition may be in respect of words or the actual ruling. Thus the *ḥadīth* which tells us that the Prophet performed the 'īd prayer with seven *takbīr* (that is, saying 'Allāhu akbar') is preferred to the one telling us that that he uttered only four *takbīr*. In regard to penalties, a *ḥadīth* that omits a punishment is to be preferred to the one that imposes one. This is in order to comply with the Qur'ānic declaration that 'God does not intend to impose hardship upon people' (al-Baqarah, 2:185).

ولا يريد بكم العسر

This position resembles another rule of preference, which is that a *ḥadīth* which affirms the original principles of non-liability (*al-barā'ah al-aṣliyyah*) is preferred to the one that negates it. Note, for example, the conflict between the two *ḥadīth*, one of which declares: 'Whoever touches his sexual organ must refresh his ablution'

من مس ذكره فليتوضأ

and the other in which the Prophet is reported to have said concerning the same that 'it is only a part of your body'

إن هو إلا بضعة منك

The latter *ḥadīth* is preferred as it confirms original non-liability. Moreover, a *ḥadīth* that is followed by the 'ulamā' of Medina or the four leading Imams is preferred to one that has not commanded such following.¹³

Another rule of preference, as already indicated, is that prohibition takes priority over permissibility. Thus if there are two conflicting rules of equal strength on the same issue, one prohibitory and the other permissive, the former will take priority over the latter. Having said this, however, it is possible that the *mujtahid* may depart from this rule and instead apply that which brings ease in preference to the one that entails hardship.¹⁴

If the attempt at reconciling two conflicting texts, or at preferring one over the other, have both failed, recourse may be had to abrogation. This will necessitate an enquiry into the occasions of revelation (*asbāb al-muzil*), the relevant materials in the *Sunnah*, and the chronological order between the two texts. If this also proves unfeasible, then action must be suspended on both and the *mujtahid* may resort to inferior evidences in order to determine the ruling on the issue. Thus if the conflict happens to be between two rulings of the Qur'an, he may depart from both and determine the matter with reference to the *Sunnah*. Should there be a conflict between two rulings of the *Sunnah*, then the *mujtahid* may refer, in descending order, to the *fatwā* of Companions, and failing that, the issue may be determined on grounds of *qiyās*. However, if the *mujtahid* fails to find a ruling in any of the lower categories of proofs, then he may resort to the general norms of *Shari'ah* that may be applicable to the case. These may be illustrated in the following example. A conflict is encountered between the two rulings of Qur'an concerning the recitation of the portions of the Qur'an in congregational prayer. The question that needs to be answered is whether in a congregational *ṣalāh*, the congregation member, that is the *muqtadi*, is required to recite the sūra al-Fātiḥah after the imam, or whether he should remain silent. Two conflicting answers can be derived from this question from the Qur'an. The first of the two *āyāt* under discussion provides: 'And when the Qur'an is being read, listen to it attentively and pay heed, so that you may receive mercy' (al-A'rāf, 7: 204).

وإذا قرئ القرآن فاستمعوا له وأنصتوا لعلكم ترحمون

It would appear that the *muqtadi* according to this *āyah*, should remain silent when the imam recites the Qur'an. However, according to another *āyah*, everyone, that is both the imam and the *muqtadi*, is ordered to 'read whatever is easy for you of the Qur'an' (al-Muzammil, 73:20).

فأقروا ما تيسر من القرآن

Although neither of the two texts make a particular reference to *ṣalāh*, they appear nevertheless to be in conflict with regard to the position of the *muqtadi*. There is no additional evidence available to enable the preference of one over the other; action is therefore suspended on both and the issue is determined with reference to the *Sunnah*. It is thus reported that on one occasion when the Prophet led the *ṣalāh*, he asked the members of the congregation whether they recited the Qur'an with him, and having heard their answers, he instructed them not to recite the Qur'an behind the imam. But there still remains a measure of inconsistency even in the *ḥādīth* that are reported on this point, which would explain why the jurists have also differed on it: Abū Ḥanīfah, Mālik, Ibn Ḥanbal and al-Shāfi'i (according to his former view which he revised later) have held that it is not necessary to recite al-Fātiḥah behind the imam in those prayers in which he recites the Qur'an aloud, but that when the imam recites quietly, the worshippers should recite al-Fātiḥah. The later Hanafi jurists have, however, held the view that it is not necessary for the worshipper to recite the Qur'an behind the imam in either case.¹⁵

In the event where an issue cannot be determined by reference to the *Sunnah*, the *mujtahid* may resort to the *fatwā* of a Companion, and failing that, to *qiyās*. There is, for example, an apparent conflict between the two reports concerning the way that the Prophet performed the *ṣalāt al-kusūf*, that is, prayer offered on the occasion of a solar eclipse. According to one of the reports, the Prophet offered two units (i.e. two *rak'ahs*) of *ṣalāh*, each consisting of two bowings (*rukū'*) and two prostrations (*sajdah*). But according to another report, each of the two units contained four bowings and four prostrations. There is yet another report that each of the two *rak'ahs* contained three bowings and three prostrations.¹⁶ The conflicting contents of these reports can neither be reconciled, nor can one be given preference over the other. Hence action is suspended on all and the matter is determined on grounds of *qiyās*. In this case, since *ṣalāt al-kusūf* is a variety of *ṣalāh*, the normal rules of *ṣalāh* are applied to it. Since all obligatory *ṣalāh*, without any variation, contains one bowing and two prostrations, this is also by way of analogy extended to *ṣalāt al-kusūf*.¹⁷

In the event of a conflict occurring between two analogies, if they cannot be reconciled with one another, then one of them must be given preference. The *qiyās* whose effective cause ('illah) is stated in

an explicit text is to be preferred to the one whose 'illah has been derived through inference (*istinbāt*). Similarly, a *qiyās* whose 'illah is founded in an allusive text (*ishārah al-naṣṣ*) takes priority over *qiyās* whose 'illah is merely a proper or reasonable attribute derived through inference and *ijtihād*. When the 'illah of *qiyās* is explicitly stated in the *naṣṣ* or when the result of *qiyās* is upheld by *ijmā'*, no conflict is expected to arise. In the unlikely event where the *mujtahid* constructs an analogy on the basis of an inferred effective cause ('illah *mustanbatāh*) while the 'illah is explicitly stated in the *naṣṣ*, and he reaches a divergent result, it is put down to his ignorance of the *naṣṣ*, and the result that he has reached will be ignored.¹⁸

A conflict may well arise between two analogies that are both founded on an inferred 'illah, since this type of 'illah involves a measure of speculative reasoning and *ijtihād*. Two *mujtahidūn* may thus arrive at different conclusions with regard to the identification of an 'illah. This is, for example, the case regarding the 'illah of compulsory guardianship (*uṣlāyah al-ijbār*) in the marriage of a minor girl. Imam Abū Hanīfah considers the 'illah of the guardian's power of *ijbār* in marriage to be the minority of the ward, whereas Imam al-Shāfi'i considers the 'illah to be her virginity. This difference of *ijtihād* would in turn give rise to analogies whose results diverge from one another depending on which of the two effective causes they are based on. However, differences of this nature are tolerated and neither of the two Imams have attempted to discourage diversity in *ijtihād*. In the event where neither of the two conflicting analogies can be preferred to the other, it is for the *mujtahid* to choose the one that seems good to him even if there is no basis for such a preference other than his own personal opinion.¹⁹

If none of the foregoing methods can be applied in order to determine the ruling on an issue, then the *mujtahid* may take any of the following three courses of action: to choose whichever of the two evidences that seems good to him; abandon acting on both, which is known as *al-waḳf*, or *tasāqūt al-dalīlayn*; and lastly, base his decision on the original norms of the *Sharī'ah*. This would be done on the assumption that no specific indication could be found in the *Sharī'ah* on the case. An example of this is to determine the ruling of the *Sharī'ah* that might have to be applied to a hermaphrodite whose gender, whether male or female, cannot be determined and where neither side could be preferred to the other. A recourse to the original norms in this case means that the issue remains where it was in the first place. Since neither of the two possibilities can be preferred to the other,

action will be based on one side or the other, not because of any evidence to warrant such a preference but as a precautionary measure when the circumstances may indicate such a course of action. Thus in some situations, in the distribution of shares in inheritance, for example, the hermaphrodite will be presumed a male, while he will be presumed a female in other situations as considerations of caution and prevention of possible harm to him may suggest.²⁰

In making such decisions, it is essential that the *mujtahid* does not act against the general principles and spirit of the *Sharī'ah*. When he weighs the merits and demerits of conflicting evidences, he must never lose sight of the basic objectives of the Lawgiver.

NOTES

1. Badrān, *Uṣūl*, p. 461; Khudārī, *Uṣūl*, p. 359; Aghnides, *Muhammadian Theories*, p. 66.
2. Ghazālī, *Mustaṣṣā*, II, 126; Khallāf, 'Ilm, p. 230.
3. Khallāf, 'Ilm, p. 229; Khudārī, *Uṣūl*, p. 359.
4. Abū Zahrah, *Uṣūl*, p. 245; Badrān, *Uṣūl*, p. 467; Khallāf, 'Ilm, p. 23.
5. Zuhaylī, *Uṣūl*, pp. 482-3.
6. Muslim, *Ṣaḥīḥ*, p. 281, *ḥadīth* no. 1059; Badrān, *Uṣūl*, p. 465.
7. Tabrizī, *Mishkāt*, III, 1695, *ḥadīth* no. 6001.
8. Badrān, *Uṣūl*, p. 466.
9. Cf. Khudārī, *Uṣūl*, p. 361.
10. Abū Dāwūd, *Sunan*, II, 486-7, *ḥadīth* nos. 1839 and 1840; Ghazālī, *Mustaṣṣā*, II, 128; Khudārī, *Uṣūl*, p. 367.
11. Abū Zahrah, *Uṣūl*, p. 246.
12. Abū Dāwūd, *Sunan*, II, 601-2, *ḥadīth* nos. 2223-7 and footnote no. 1548; Badrān, *Uṣūl*, p. 465; Khudārī, *Uṣūl*, p. 363.
13. Hitt, *Wajīz*, p. 438ff; Zuhayrī, *Uṣūl*, IV, 213.
14. Khallāf, 'Ilm, p. 232; Badrān, *Uṣūl*, p. 470.
15. Abū Dāwūd, *Sunan*, II, 211, *ḥadīth* no. 825 and footnote no. 373; Badrān, *Uṣūl*, pp. 468-9.
16. Abū Dāwūd, *Sunan*, II, 211, *ḥadīth* nos. 1173-7.
17. Badrān, *Uṣūl*, p. 469.
18. Khallāf, 'Ilm, p. 232; Badrān, *Uṣūl*, p. 470.
19. Abū Zahrah, *Uṣūl*, pp. 247-8; Khudārī, *Uṣūl*, p. 360.
20. Badrān, *Uṣūl*, pp. 469-70.

Ijtihād (Personal Reasoning)

Ijtihād is the most important source of Islamic law next to the Qur'an and the *Sunnah*. The main difference between *ijtihad* and the revealed sources of the *Sharī'ah* lies in the fact that *ijtihad* is a continuous process of development whereas divine revelation and prophetic legislation discontinued after the demise of the Prophet. In this sense, *ijtihad* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth.

Since *ijtihad* derives its validity from divine revelation, its propriety is measured by its harmony with the Qur'an and the *Sunnah*. The sources of Islamic law are therefore essentially monolithic, and the commonly accepted division of the roots of jurisprudence into the primary and secondary is somewhat formal rather than real. The essential unity of the *Sharī'ah* lies in the degree of harmony that is achieved between revelation and reason. *Ijtihad* is the principal instrument of maintaining this harmony. The various roots of Islamic law that feature next to the Qur'an and the *Sunnah* are all manifestations of *ijtihad*, albeit with differences that are largely procedural in character. In this way, consensus of opinion, analogy, juristic preference, considerations of public interest (*maṣlahah*), etc., are all interrelated not only under the main heading of *ijtihad*, but through it to the Qur'an and the *Sunnah*.¹ It is partly due to the formalistic character of these sub-divisions that they are often found to be overlapping and concurrent. Thus a ruling of *ijmā'* is often based on analogy, *maṣlahah* or *istihsān*, and so on, despite its being designated as *ijmā'*. Similarly, *qiyās* and *istihsān* are closely related to one another in the sense that one of

the two main varieties of *istihsān* consists of a selection between two analogies on the same issue. The difference between *maṣlahah* and *istihsān* is largely procedural, for they are essentially the same, the one being reflective of the Mālikī and the other of the Hanafī approach to *ijtihad*. It is thus evident that all the non-revealed proofs of *Sharī'ah* are an embodiment of the single phenomenon of *ijtihad*. I present this chapter as our last in the substantive themes on this work partly to acknowledge that *ijtihad* is the end result of *uṣūl al-fiqh* and a cardinal objective of studying this discipline.

Being a derivation from the root word *jahada*, *ijtihad* literally means striving, or self-exertion in any activity that entails a measure of hardship. It would thus be in order to use *jahada* in respect of one who carries a heavy load, but not so if he carries only a light weight. Juridically, however, *ijtihad* mainly consists not of physical, but of intellectual exertion on the part of the jurist. *Ijtihad* is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Sharī'ah* from their detailed evidence in the sources.² Some 'ulamā' have defined *ijtihad* as the application by a jurist of all his faculties either in inferring the rules of *Sharī'ah* from their sources, or in implementing such rules and applying them to particular issues.³ *Ijtihad* essentially consists of an inference (*istinbāt*) that amounts to a probability (*ẓann*), thereby excluding the extraction of a ruling from a clear text. It also excludes the discovery of a *hukm* by asking a learned person or by consulting the relevant literature without the exercise of one's own opinion and judgement. Thus a person who knows the rules of *Sharī'ah* in detail but is unable to exercise his judgement in the inference of the *ahkām* directly from their sources is not a *mujtahid*. *Ijtihad*, in other words, consists of the formulation of an opinion in regard to a *hukm sharī'i*. The presence of an element of speculation in *ijtihad* implies that the result arrived at is probably correct, while the possibility of its being erroneous is not excluded. *Ẓann* in this context is distinguished from 'ilm, which implies positive knowledge. Since the decisive rules of *Sharī'ah* impart positive knowledge, they are excluded from the scope of *ijtihad*.⁴ Also essential to the meaning of *ijtihad* is the concept that the endeavour of the jurist involves a total expenditure of effort in such a manner that the jurist feels an inability to exert himself further. If the *mujtahid* has failed to discover the evidence which he was capable of discovering, his opinion is void.⁵ And lastly, the definition of *ijtihad* is explicit on the point that only a jurist (*faqih*) may practice *ijtihad*. This is explained by the requirements of *ijtihad*, namely the qualifications that must be

fulfilled for attainment to the rank of *mujtahid*. When these requirements are met, it is inevitable that the *mujtahid* must also be a *faqih*. Thus the definition of *ijtihād* precludes self-exertion by a layman in the inference of *ahkām*.⁶

The subject of *ijtihād* must be a question of *Sharī'ah*; more specifically, *ijtihād* is concerned with the practical rules of *Sharī'ah* which usually regulate the conduct of those to whom they apply (i.e. the *mukallaf*). This would preclude from the scope of *ijtihād* purely intellectual ('*aqli*) and customary ('*urfī*) issues, or matters that are perceptible to the senses (*hissi*) and do not involve the inference of a *hukm shar'i* from the evidence present in the sources. Thus *ijtihād* may not be exercised in regard to such issues as the creation of the universe, the existence of a Creator, the sending of prophets, and so forth, because there is only one correct view in regard to these matters, and anyone who differs from it is wrong. Similarly, one may not exercise *ijtihād* on matters such as the obligatory status of the pillars of the faith, or the prohibition of murder, theft and adultery. For these are evident truths of the *Sharī'ah* which are determined in the explicit statements of the texts.⁷

The detailed evidences found in the Qur'ān and the *Sunnah* are divided into four types, as follows: (1) evidence which is decisive both in respect of authenticity and meaning; (2) evidence which is authentic but speculative in meaning; (3) that which is of doubtful authenticity, but definite in meaning; (4) evidence which is speculative in respect both of authenticity and meaning. *Ijtiḥād* does not apply to the first of the foregoing categories, such as the clear *nuṣūṣ* concerning the prohibition of adultery and theft. But *ijtiḥād* can validly operate in regard to any of the remaining three types of evidence, as the following illustrations will show.

An example of *ijtiḥād* concerning evidence which is definite of proof but speculative of meaning is the Qur'ānic text in sūra al-Baqarah (2:228): 'The divorced women must observe three courses [*qunū'*] upon themselves.'

والمطلقات يتربصن بأنفسهن ثلاثة قروء

There is no doubt concerning the authenticity of this text, as the Qur'ān is authentic throughout. However, its meaning, in particular the precise meaning of the word *qunū'*, is open to speculation. *Qunū'* is a homonym meaning both 'menstruation' and 'the clean periods between menstruation'. Whereas Imam Abū Ḥanīfah and Ibn Ḥanbal

have adopted the former, Imam Shāfi'ī and Mālik have adopted the latter meaning, and their respective *ijtiḥād* leads them to correspondingly different results.⁸

Ijtiḥād in regard to the third variety of evidence relates mainly to *ḥadīth* material, which may have a definitive meaning but whose authenticity is open to doubt. To give an example, the *ḥadīth* which provides in regard to *zakāh* on camels that 'a goat is to be levied on every five camels'⁹

من كل خمس شاة.

has a clear meaning, which is why the jurists are in agreement that there is no *zakāh* on less than five camels. But since this is a solitary *ḥadīth*, its authenticity remains speculative. *Ijtiḥād* concerning it may take the form of an investigation into the authenticity of its transmission and the reliability of its narrators, matters on which the jurists are not unanimous due to the different criteria that they apply. Should the differences of *ijtiḥād* and the rulings so arrived at conflict to the point that no reliance can be placed on any, they are all to be abandoned and no obligation may be established on their basis.¹⁰

To give an example of *ijtiḥād* concerning evidence that is speculative in both authenticity and meaning, we may refer to the *ḥadīth* that provides: 'There is no *ṣalāh* [*lā ṣalāta*] without the recitation of sūra al-Fātiḥah.'¹¹

لا صلاة إلا بفاتحة الكتاب.

Being a solitary *ḥadīth*, its authenticity is not proven with certainty. Similarly, it is open to different interpretations in the sense that it could mean either that *ṣalāh* without the Fātiḥah is invalid, or that it is merely incomplete. The Hanafīs have held the latter, whereas the Shāfi'īs have adopted the former meaning of the *ḥadīth*.

I. The Value (*Hukm*) of *Ijtiḥād*

Legal theory in all its parts derives its validity from the revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator that the practice of *ijtiḥād* is a religious duty. The '*ulamā'* are in agreement that *ijtiḥād* is the collective obligation (*farḍ kafa'i*) of all qualified jurists in the event where an issue arises but no urgency is encountered regarding its ruling. The duty remains

unfulfilled until it is performed by at least one *mujtahid*. If a question is addressed to two *mujtahidūn*, or to two judges for that matter, and one of them exerts himself to formulate a response, the other is absolved of his duty. But *ijtihād* becomes a personal obligation (*wājib* or *farḍ ‘aynī*) of the qualified *mujtahid* in urgent cases, that is, when there is fear that the cause of justice or truth may be lost if *ijtihād* is not immediately attempted. This is particularly the case when no other qualified person can be found to attempt *ijtihād*. With regard to the *mujtahid* himself, *ijtihād* is *wājib ‘aynī*: he must practice *ijtihād* in order to find the ruling for an issue that affects him personally. This is so because imitation (*taqlīd*) is forbidden to a *mujtahid* who is capable of deducing the *hukm* directly from the sources. Should there be no urgency in *ijtihād*, or in the event where other *mujtahids* are available, then the duty remains as a *farḍ kaḥfī* only. Furthermore, *ijtihād* is recommended (*mandūb*) in all cases where no particular issue has been referred to the *mujtahid*, or when it is attempted in the absence of an issue by way of theoretical construction at the initiative of the jurist himself. And finally, *ijtihād* is forbidden (*harām*) when it contradicts the decisive rules of the Qur’ān, the *Sunnah* and a definite *ijmā‘*.¹²

The ‘*ulamā’* of *uṣūl* are in agreement that the *mujtahid* is bound by the result of his own *ijtihād*. Once he has deduced the ruling on a particular issue, and it is founded in his true conviction and belief, he may not imitate other *mujtahidūn* on that matter regardless of whether they agree with him or otherwise; for the *mujtahid*, the conclusion that he reaches is tantamount to a divine command that he must observe. It is therefore unlawful for him to abandon it or to follow anyone else in respect of it. But if he has not rendered his own *ijtihād* on an issue that is not urgent, and he has time to investigate, then, according to some ‘*ulamā’*, he may imitate other *mujtahidūn*. However, the preferred view is that he must avoid *taqlīd*, even of one who might be more learned than him. Only a ‘*āmmī* (ignorant person) who is incapable of *ijtihād* is allowed to follow the opinion of others.¹³ This is considered to be the purport of the Qur’ānic command, addressed to all those who have the capacity and knowledge, to exert themselves in the cause of justice and truth (al-Hashr, 59:2). Elsewhere we read in the Qur’ān (Muḥammad, 47:24): ‘Will they not meditate on the Qur’ān, or do they have locks on their hearts?’

أَفَلَا يَتَذَكَّرُونَ الْقُرْآنَ أَمْ عَلَى قُلُوبِ أَقْفَالِهَا

The same conclusion is sustained by another Qur’ānic passage, in *sūra al-Nisā’* (4:59) where the text requires the judgement of all disputes to be referred to God and to His Messenger. These and many similar *āyāt* in the Qur’ān lend support to the conclusion that it is the duty of the learned to study and investigate the Qur’ān and the teachings of the Prophet. The correct meaning of the manifest directives (*ẓawāhir*) of the Qur’ān is also understood from the practice of the Companions, who used to investigate matters, and each would formulate his own *ijtihād*, in which case they would not imitate anyone else.¹⁴ The *mujtahid* is thus the authority (*hujjah*) for himself. His is the duty to provide guidance to those who do not know, but he himself must remain in close contact with the sources. This is also the purport of another Qur’ānic *āyah* which enjoins those who do not possess knowledge: ‘Then ask those who have knowledge [*ahl al-dhikr*] if you yourselves do not know’ (al-Nahl, 16: 43).

فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ

Thus only those who do not know may seek guidance from others, not those who have the ability and knowledge to deduce the correct answer themselves. The *ahl al-dhikr* in this *āyah* refers to the ‘*ulamā’*, regardless of whether they actually know the correct ruling of an issue or not, provided they have the capacity to investigate and find out.¹⁵

When a *mujtahid* exerts himself and derives the ruling on a particular issue on the basis of probability, but after a period of time changes his opinion on the same issue, he may set aside or change his initial ruling if this will only affect him personally. For example, when he enters a contract of marriage with a woman without the consent of her guardian (*wālī*) and later changes his opinion on the validity of such a marriage, he must annul the *nikāḥ*. But if his *ijtihād* affects others, when, for example, he acts as a judge and issues a decision on the basis of his own *ijtihād* and then changes his views, he may not, according to the majority of ‘*ulamā’*, set aside his earlier decision. For if one ruling of *ijtihād* could be set aside by another, then the latter must be equally subject to reversal, and this would lead to uncertainty and loss of credibility in the *ahkām*.¹⁶ It is reported that ‘Umar ibn al-Khaṭṭāb adjudicated a case, known as *Hajariyyah*, in which a deceased woman was survived by her husband, mother, two consanguine and two uterine brothers. ‘Umar ibn al-Khaṭṭāb entitled all the brothers to a share in one-third of the estate, but was told by one of the parties

that the previous year, he ('Umar) had not entitled all the brothers to share the portion of one-third. To this the caliph replied, 'That was my decision then, but today I have decided it differently.' Thus the Caliph 'Umar upheld both his decisions and did not allow his latter decision to affect the validity of the former.¹⁷ Similarly, the decision of one judge may not be set aside by another merely because the latter happens to have a different opinion on the matter. It is reported that a man whose case was adjudicated by 'Ali and Zayd informed 'Umar ibn al-Khaṭṭāb of their decision, to which the latter replied that he would have ruled differently if he were the judge. To this the man replied, 'Then why don't you, as you are the Caliph?' 'Umar ibn al-Khaṭṭāb replied that had it been a matter of applying the Qur'ān or the *Sunnah*, he would have intervened, but since the decision was based in *ra'y*, they were all equal in this respect.¹⁸ Since in matters of juristic opinion no-one can be certain that a particular view is wrong, the view that has already been embodied in a judicial decree has a greater claim to validity than the opposite view. The position is, however, different if the initial decision is found to be in violation of the law, in which case it must be set aside. This is the purport of the ruling of 'Umar ibn al-Khaṭṭāb, which he conveyed in his well-known letter to Abū Mūsā al-Ash'arī as follows: 'And let not a judgement that you have rendered yesterday, and then upon reconsideration you find that it was wrong, deter you from returning to truth. For truth is timeless and returning to truth is better than continuing in falsehood.'¹⁹

II. The Proof (*Hujjiyyah*) of *Ijtihād*

Ijtihād is validated by the Qur'ān, the *Sunnah* and the dictates of reason ('aql). Of the first two, the *Sunnah* is more specific in validating *ijtihad*. The *hadith* of Mu'adh ibn Jabal,²⁰ as al-Ghazālī points out, provides a clear authority for *ijtihad*. The same author adds that the claim that this *hadith* is *mursal* (i.e. a *hadith* whose chain of narration is broken at the point when the name of the Companion who heard it from the Prophet is not mentioned) is of no account, for the *ummah* has accepted it and has consistently relied on it; no further dispute about its authenticity is therefore warranted.²¹ According to another *hadith*, 'When a judge exercises *ijtihad* and gives a right judgement, he will have two rewards, but if he errs in his judgement, he will still have earned one reward.'²²

الحاكم إذا اجتهد فأصاب فله أجران ،
وإن اجتهد فأخطأ فله أجر .

This *hadith* implies that regardless of its results, *ijtihad* never partakes of sin. When the necessary requirements of *ijtihad* are present, the result is always meritorious and never blameworthy.²³ In another *hadith*, the Prophet is reported to have said: 'Strive and endeavour [*ijtahidū*], for everyone is ordained to accomplish that which he is created for.'²⁴

اجتهدوا فكل ميسر لما خلق له .

There is also the *hadith* which reads: 'When God favours one of His servants, He enables him to acquire knowledge [*tafaquh*] in religion.'²⁵

من يرد الله به خيرا يفقهه في الدين .

The '*ulamā*' of *uṣūl* have also quoted in this connection two other *hadith*, one of which makes the pursuit of knowledge an obligation of every Muslim, man or woman:

طلب العلم فريضة على كل مسلم ومسلمة .

and the other declares the '*ulamā*' to be the successors of the Prophets.²⁶

العلماء ورثة الأنبياء .

The relevance of the last two *hadith* to *ijtihad* is borne out by the fact that *ijtihad* is the main instrument of creativity and knowledge in Islam.

The numerous Qur'ānic *āyāt* that relate to *ijtihad* are all in the nature of probabilities (*ṣawāhīr*). All the Qur'ānic *āyāt* that the '*ulamā*' have quoted in support of *qiyās* can also be quoted in support of *ijtihad*. In addition, we read, in sūra al-Tawbah (9:122): 'Let a contingent from each division of them devote themselves to the study of religion and warn their people.'

فلولا نفر من كل فرقة منهم طائفة ليتفقهوا
في الدين ولينذروا قومهم

Devotion to the study of religion is the essence of *ijtihād*, which should be a continuous feature of the life of the community. Although the pursuit of knowledge is a duty on every individual, attaining *tafaqquh*, or 'erudition in religious disciplines', is necessary for those who guide the community and warn them against deviation and ignorance. On a similar note, we read in sūra al-'Ankabūt (29:69): 'And those who strive [*wa'l-ladhina jahādū*] in Our cause, We will certainly guide them in Our paths.'

وَالَّذِينَ جَاهَدُوا فِينَا لَنَهْدِيَنَّهُمْ سُبُلَنَا

It is interesting that in this *āyah* the word *subulānā* ('Our paths') occurs in the plural form, which might suggest that there are numerous paths toward the truth, which are all open to those who exert themselves in its pursuit. Furthermore, we read in sūra al-Nisā' (4:59): 'If you dispute over something, then refer it to God and to the Messenger.'

فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ

The implementation of this *āyah* would necessitate knowledge of the Qur'ān, the *Sunnah* and the objectives (*maqāṣid*) of the Lawgiver on whose basis disputed matters could be adjudicated and resolved.

The Companions practised *ijtihād*, and their consensus is claimed in support of it.²⁷ In their search for solutions to disputed matters, they would base their judgement on the Qur'ān and the *Sunnah*, but if they failed to find the necessary guidance therein, they would resort to *ijtihād*. The fact that the Companions resorted to *ijtihād* in the absence of a *naṣṣ* is established by continuous testimony (*tauwātur*).²⁸ The rational argument in support of *ijtihād* is to be sought in the fact that while the *nuṣūṣ* of *Shari'ah* are limited, new experiences in the life of the community continue to give rise to new problems. It is therefore imperative for the learned members of the community to attempt to find solutions to such problems through *ijtihād*.²⁹

III. The Conditions (*Shuṭūṭ*) of *Ijtihād*

A *mujtahid* must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence that enables him to form an independent judgement. In his capacity as a successor to the Prophet, the *mujtahid* performs a religious duty, and his verdict is

a proof (*hujjah*) to those who follow him; he must therefore be a Muslim and be knowledgeable in the various disciplines of religious learning. A person who fails to meet one or more of the requirements of *ijtihād* is disqualified and may not exercise *ijtihād*. The requirements that are discussed below relate to *ijtihād* in its unrestricted form, often referred to as *ijtihād fi'l-shar'*, as opposed to those varieties of *ijtihād* that are confined to a particular school, or to particular issues within the confines of a given *madhhab*.

The earliest complete account of the qualifications of a *mujtahid* is given in Abu'l-Ḥusayn al-Baṣrī's *al-Mu'tamad fi Uṣūl al-Fiqh*. The broad outline of al-Baṣrī's exposition was later accepted, with minor changes, by al-Shīrāzī (d. 1083 AD), al-Ghazālī and al-Āmidī (d. 1234 AD). This does not mean that the requirements of *ijtihād* received no attention from the 'ulamā' who lived before al-Baṣrī. But it was from then onwards that they were consistently adopted by the 'ulamā' of *uṣūl* and became a standard feature of *ijtihād*.³⁰ These requirements are as follows.

(1) A knowledge of Arabic to the extent that enables the scholar to enjoy a correct understanding of the Qur'ān and the *Sunnah*. A complete command of and erudition in Arabic is not a requirement, but the *mujtahid* must know the nuances of the language and be able to comprehend the sources accurately and deduce the *ahkām* from them with a high level of competence.³¹ Al-Shāṭibī, however, lays greater emphasis on the knowledge of Arabic: a person who possesses only an average knowledge of Arabic cannot aim at the highest level of attainment in *ijtihād*. The language of the Qur'ān and the *Sunnah* is the key to their comprehension and the *ijtihād* of anyone who is deficient in this respect is unacceptable. The same author adds: since the opinion of the *mujtahid* is a proof (*hujjah*) for a layman, this degree of authority necessitates direct access to the sources and full competence in Arabic.³²

(2) The *mujtahid* must also be knowledgeable in the Qur'ān and the *Sunnah*, the Meccan and the Medinan contents of the Qur'ān, the occasions of its revelation (*asbāb al-nuzūl*) and the incidences of abrogation therein. More specifically, he must have a full grasp of the legal contents, or the *āyāt al-ahkām*, but not necessarily of the narratives and parables of the Qur'ān and its passages relating to the hereafter.³³ According to some 'ulamā', including al-Ghazālī, Ibn al-'Arabī and Abū Bakr al-Rāzī, the legal *āyāt* of the Qur'ān that the *mujtahid* must know amount to about five hundred. Al-Shawkānī, however, observes that a specification of this kind cannot be definitive.

For a *mujtahid* may infer a legal rule from the narratives and parables that are found in the Qur'an. The knowledge of *āyāt al-ahkām* includes knowledge of the related commentaries (*tafāsīr*) with special reference to the *Sunnah* and the views of the Companions. Al-Qurtubī's *Tafsīr al-Qurtubī* and the *Ahkām al-Qur'an* of Abū Bakr 'Alī al-Jaṣṣāṣ are particularly recommended.³⁴

(3) Next, the *mujtahid* must possess an adequate knowledge of the *Sunnah*, especially that part of it that relates to the subject of his *ijtihād*. This is the view of those who admit the divisibility (*tajzi'ah*) of *ijtihād* (for which see below), but if *ijtihād* is deemed to be indivisible, then the *mujtahid* must be knowledgeable of the *Sunnah* as a whole, especially with reference to the *ahkām* texts, often referred to as *ahādīth al-ahkām*. He must know the incidences of abrogation in the *Sunnah*, the general and the specific, ('āmm and khāṣṣ), the absolute and the qualified (*muṭlaq* and *muqayyad*), and the reliability or otherwise of the narrators of *ḥādīth*. It is not necessary to commit to memory the *ahādīth al-ahkām* or the names of their narrators, but he must know where to find the *ḥādīth* when he needs to refer to them, and be able to distinguish the reliable from the weak and the authentic from the spurious.³⁵ Imam Ghazālī points out that an adequate familiarity with the *ahādīth al-ahkām*, such as those found in *Sunan Abū Dāwūd*, *Sunan al-Bayhaqī*, or the *Musnad* of Ibn Ḥanbal, would suffice. According to another view, which is attributed to Ahmad ibn Ḥanbal, the *ahādīth al-ahkām* are likely to number in the region of 1,200.³⁶ The legal *ḥādīth* have been collected in various works, including the one by Ibn Daqīq al-'Id (d. 702 AH) which included 1,471 *ḥādīth*.

(4) The *mujtahid* must also know the substance of the *furū'* works and the points on which there is an *ijmā'*. He should be able to verify the consensus of the Companions, the Successors and the leading Imams and *mujtahidūn* of the past so that he is guarded against the possibility of issuing an opinion contrary to such an *ijmā'*. It would be rare, al-Shawkānī observes, for anyone who has attained the rank of a *mujtahid* not to be aware of the issues on which there is conclusive *ijmā'*. By implication, the *mujtahid* must also be aware of the opposing views, as it is said, "The most learned of people is also one who is most knowledgeable of the differences among people".³⁷

(5) In their expositions of the qualifications of a *mujtahid*, the 'ulamā' of *uṣūl* place special emphasis on the knowledge of *qiyās*. The Qur'an and the *Sunnah*, on the whole, do not completely specify the law as it might be stated in a juristic manual, but contain general rulings and indications as to the causes of such rulings. The *mujtahid* is thus

enabled to have recourse to analogical deduction in order to discover the ruling for an unprecedented case. An adequate knowledge of the rules and procedures of *qiyās* is thus essential for the *mujtahid*. Imam Shāfi'i has gone so far as to equate *ijtihād* with *qiyās*. Analogy, in other words, is the main bastion of *ijtihād*, even if the two are not identical. Al-Ghazālī has observed that notwithstanding the claim by some 'ulamā' that *qiyās* and *ijtihād* are identical and coextensive, *ijtihād* is wider than *qiyās* as it comprises methods of reasoning other than analogy.³⁸

(6) Furthermore, the *mujtahid* should know the objectives (*maqāṣid*) of the *Sharī'ah*, which consist of the *maṣāliḥ* (considerations of public interest). The most important *maṣāliḥ* are those that the Lawgiver has Himself identified and which must be given priority over others. Thus the protection of the 'Five Principles', namely of life, religion, intellect, lineage and property, are the recognised objectives of the Lawgiver. These are the essentials (*darūriyyāt*) of the *maṣāliḥ* and as such they are distinguished from the complementary (*hājjiyyāt*) and the embellishments (*taḥsīniyyāt*). The *mujtahid* must also know the general maxims of *fiqh* such as the removal of hardship (*raf' al-haraj*), that certainty must prevail over doubt, and other such principles that are designed to prevent rigidity in the *ahkām*. He must be able to distinguish the genuine *maṣāliḥ* from those that might be inspired by whimsical desires, and be able to achieve a correct balance between values.³⁹

Al-Shāfi'bī summarises all the foregoing requirements of *ijtihād* under two main headings, one of which is the adequate grasp of the objectives of the *Sharī'ah*, while the other is the knowledge of the sources and methods of deduction. The first of these is fundamental, and the second serves as an instrument of achieving the first.⁴⁰

It is further suggested in this connection that the *mujtahid* must be capable of distinguishing strength and weakness in reasoning and evidence. This requirement has prompted some 'ulamā' to say that the *mujtahid* should have a knowledge of logic (*manṭiq*). But this is not strictly a requirement. For logic as a discipline had not even developed during the time of the Companions, but this did not detract from their ability to practice *ijtihād*.⁴¹

And finally, the *mujtahid* must be an upright ('ādil) person who refrains from committing sins and whose judgement the people can trust. His sincerity must be beyond question and untainted with self-seeking interests. For *ijtihād* is a sacred trust, and anyone who is tainted with heresy and self-indulgence is unworthy of it.⁴² These are

the conditions of independent *ijtihād*, but a *mujtahid* on particular issues need only know all the relevant information concerning those issues and may, at least according to those who admit the 'divisibility' of *ijtihād*, practice *ijtihād* in respect of them. His lack of knowledge in matters unrelated to the issues concerned does not prejudice his competence for *ijtihād*.⁴³

Some observers have suggested that the practice of *ijtihād* was abandoned partly because the qualifications required for its practice were made 'so immaculate and rigorous and were set so high that they were humanly impossible of fulfilment'.⁴⁴ This is, however, an implausible supposition that has been advanced mainly by the proponents of *taqlīd* with a view to discouraging the practice of *ijtihād*. As for the actual conditions, Abdur Rahim (with many others) has aptly observed that 'the qualifications required of a *mujtahid* would seem to be extremely moderate, and there can be no warrant for supposing that men of the present day are unfitted to acquire such qualifications'.⁴⁵ There is little evidence to prove that fulfilling the necessary conditions of *ijtihād* was beyond the reach of the 'ulamā' of later periods. On the contrary, as one observer has pointed out, 'the total knowledge required on the part of the jurist enabled many to undertake *ijtihād* in one area of the law or another'.⁴⁶ Their task was further facilitated by the legal theory, in particular the *ḥadīth* that absolves the *mujtahid* who commits an error from the charge of sin, and even entitles him to a spiritual reward. Furthermore, the recognition in the legal theory of the divisibility of *ijtihād*, as we shall presently discuss, enabled the specialist in particular areas of the *Sharī'ah* to practice *ijtihād* even if he was not equally knowledgeable in all its other disciplines.

IV. The Divisibility of *Ijtihād*

The question to be discussed here is whether a person who is learned on a particular subject is qualified to practice *ijtihād* in that area, or whether he is required to qualify as a full *mujtahid* first in order to be able to carry out *ijtihād* at all. The majority of 'ulamā' have held the view that once a person has fulfilled the necessary conditions of *ijtihād*, he is qualified to practice it in all areas of the *Sharī'ah*. According to this view, the intellectual ability and competence of a *mujtahid* cannot be divided into compartments. *Ijtihād*, in other words, is indivisible, and we cannot say that a person is a *mujtahid* in the area of matrimonial law and an imitator (*muqallid*) in regard to devotional matters

(*'ibādāt*) or vice-versa. To say this would be tantamount to a contradiction in terms, as *ijtihād* and *taqlīd* cannot be combined in one and the same person.⁴⁷ The majority view is based on the analysis that *ijtihād*, for the most part, consists of formulating an opinion, or *ẓann*, concerning a rule of the *Sharī'ah*. A *ẓann* of this type occurs only to a fully qualified *mujtahid* who has attained the necessary level of intellectual competence. It is further argued that all the branches of the *Sharī'ah* are interrelated, and ignorance in one may lead to an error or misjudgement in another. The majority view is further supported by the argument that once a person has attained the rank of *mujtahid*, he is no longer permitted to follow others in matters where he can exercise *ijtihād* himself.⁴⁸ Among the majority there are some 'ulamā' who have allowed an exception to the indivisibility of *ijtihād*. This is the area of inheritance, which is considered to be self-contained as a discipline of *Sharī'ah* law and independent of the knowledge of the other branches. Hence a jurist who is only knowledgeable in this field may practice *ijtihād* in isolation from the other branches of *fiqh*.⁴⁹

Some Mālikī, Hanbalī and Zāhiri 'ulamā' have, however, held the view that *ijtihād* is divisible. Hence when a person is learned in a particular area of the *Sharī'ah*, he may practice *ijtihād* in that area only. This will in no way violate any of the accepted principles of *ijtihād*. There is similarly no objection, according to this view, to the possibility of a person being both a *mujtahid* and a *muqallid* at the same time. Thus a *mujtahid* may confine the scope of his *ijtihād* to the area of his specialisation. This has, in fact, been the case with many of the prominent imams, who have, on occasions, admitted their lack of knowledge in regard to particular issues. Imam Mālik is said to have admitted in regard to thirty-six issues at least that he did not know the right answer. In spite of this, there is no doubt concerning Mālik's competence as a fully-fledged *mujtahid*.⁵⁰

The view that *ijtihād* is divisible is supported by a number of prominent 'ulamā', including Abū'l-Husayn al-Baṣrī, al-Ghazālī, Ibn al-Humām, Ibn Taymiyyah, his disciple Ibn al-Qayyim and al-Shawkānī. Al-Ghazālī thus observes that a person may be particularly learned in *qiyās* and be able to practice *ijtihād* in the form of analogy even if he is not an expert on *ḥadīth*. According to the proponents of this view, if knowledge of all the disciplines of *Sharī'ah* were to be a requirement, most 'ulamā' would fail to meet it and it would impose a heavy restriction on *ijtihād*. Al-Shawkānī, Badrān and al-Kassāb have all observed that this is the preferable of the two views.⁵¹ One

might add here that in modern times, in view of the sheer bulk of information and the more rapid pace of its growth, specialisation in any major area of knowledge would seem to hold the key to originality and creative *ijtihād*. The divisibility of *ijtihād* would thus seem to be in greater harmony with the conditions of research in modern times. By way of a postscript, one might also remark that the classification of *mujtahids* into various ranks, such as *mujtahids* in a particular school or on particular issues, takes for granted the idea that *ijtihād* is divisible.

V. Procedure of *Ijtihād*

Since *ijtihād* occurs in a variety of forms, such as *qiyās*, *istihsān*, *maṣlahah mursalah*, and so on, each of these is regulated by its own rules. There is, in other words, no uniform procedure for *ijtihād* as such. The 'ulamā' have nevertheless suggested that in practising *ijtihād*, the jurist must first of all look at the *nuṣūṣ* of the Qur'ān and the *ḥadīth*, which must be given priority over all other evidences. Should there be no *naṣṣ* on the matter, then he may resort to the manifest text (*ẓāhir*) of the Qur'ān and *ḥadīth* and interpret it while applying the rules pertaining to the general ('*āmm*) and specific (*khāṣṣ*), the absolute and the qualified, and so forth, as the case may be. Should there be no manifest text on the subject in the Qur'ān and the verbal *Sunnah*, the *mujtahid* may resort to the actual (*fi'l*) and tacitly approved (*taqrīr*) *Sunnah*. Failing this, he must find out if there is a ruling of *ijmā'* or *qiyās* available on the problem in the works of the renowned jurists. In the absence of any guidance in these works, he may attempt an original *ijtihād* along the lines of *qiyās*. This would entail a recourse to the Qur'ān, the *ḥadīth* or *ijmā'* for a precedent that has an '*illah*' identical to that of the *far'* (i.e. the case for which a solution is required). When this is identified, he is to apply the principles of *qiyās* in order to deduce the necessary ruling. In the absence of a textual basis on which an analogy can be founded, the *mujtahid* may resort to any of the recognised methods of *ijtihād* such as *istihsān*, *maṣlahah mursalah*, *istiḥāb*, etc., and derive a solution while applying the rules that ensure the proper implementation of these doctrines.³²

The foregoing procedure has essentially been formulated by al-Shāfi'ī, who is noted to have observed the following. When an incident occurs, the *mujtahid* must first check the *nuṣūṣ* of the Qur'ān, but if he finds none, he must refer to *mutawātir ḥadīth* and then to solitary *ḥadīth*. If the necessary guidance is still not forthcoming,

he should postpone recourse to *qiyās* until he has looked into the manifest (*ẓāhir*) text of the Qur'ān. If he finds a manifest text that is general, he will need to find out if it can be specified by means of *ḥadīth* or *qiyās*. But if he finds nothing that will specify the manifest text, he may apply the latter as it stands. Should he fail to find a manifest text in the Qur'ān or the *Sunnah*, he must look into the *madhāhib*. If he finds a consensus among them, he applies it, otherwise he resorts to *qiyās*, but in doing so, he must pay more attention to the general principles of the *Sharī'ah* than to its subsidiary detail. If he does not find this possible, and all else fails, then he may apply the principle of original absence of liability (*al-barā'ah al-aṣliyyah*). All this must be in full cognisance of the rules that apply to the conflict of evidences (*al-ta'arūf bayn al-adillah*), which means that the *mujtahid* should know the methods deployed in reconciling such conflicts, or even eliminating one in favour of the other, should this prove to be necessary. The ruling so arrived at may be that the matter is obligatory (*uājib*), forbidden (*ḥarām*), reprehensible (*makrūh*) or recommended (*mandūb*).³³

From the viewpoint of its procedure, *ijtihād* may occur in any of the following four varieties. Firstly, there is the form of a juridical analogy (*qiyās*) which is founded on an effective cause ('*illah*'). The second variety of *ijtihād* consists of a probability (*ẓann*) without the presence of any '*illah*', such as practising *ijtihād* in regard to ascertaining the time of *ṣalāh* or the direction of the *qiblah*. The third type of *ijtihād* consists of the interpretation of the source materials and the deduction of *ahkām* from existing evidence. This type of *ijtihād* is called *ijtihād bayānī*, or 'explanatory *ijtihād*', which takes priority over 'analogical *ijtihād*', or *ijtihād qiyās*. The fourth variety of *ijtihād*, referred to as *ijtihād istiṣlāhī*, is based on *maṣlahah* and seeks to deduce the *ahkām* in pursuance of the spirit and purpose of the *Sharī'ah*, which may take the form of *istiṣlāh*, juristic preference (*istihsān*), the obstruction of means (*sadd al-dharā'if*), or some other technique. Imam Shāfi'ī accepts only the first type, namely analogical *ijtihād*, but for the majority of 'ulamā', *ijtihād* is not confined to *qiyās* and may take the form of any of the foregoing varieties.³⁴

VI. The *Ijtihād* of the Prophet and his Companions

The question to be discussed here is whether all the rulings of the Prophet should be regarded as having been divinely inspired or whether they also partake of *ijtihād*. The 'ulamā' are generally in agreement that the Prophet practised *ijtihād* in temporal and military

affairs, but they have differed as to whether his rulings in *shar'ī* matters could properly fall under the rubric of *ijtihād*. According to the Ash'arīs, the Mu'tazilah, Ibn Ḥazm al-Zāhiri and some Hanbalī and Shāfi'ī 'ulamā', the Qur'ān provides clear evidence that every speech of the Prophet partakes of *wahy*. A specific reference is thus made to sūra al-Najm (53:3) which provides: 'He says nothing of his own desire, it is nothing other than revelation [*wahy*] sent down to him.'

وما ينطق عن الهوى إن هو إلا وحي يوحى

This *āyah* is quite categorical on the point that the Prophet is guided by divine revelation and that all his utterances are to be seen in this light. This would mean that all the rulings of the Prophet consist of divine revelation and that none would occur in the form of *ijtihād*.⁵⁵

The majority of 'ulamā' have, however, held that the Prophet in fact practised *ijtihād* just as he was allowed to do so. This, it is said, is borne out by the numerous *āyāt* of the Qur'ān where the Prophet is invited, along with the rest of the believers, to meditate on the Qur'ān and to study and think about the created world. As for the *āyah* in sūra al-Najm quoted above, the majority of 'ulamā' have held that the reference here is to the Qur'ān itself, and not to every word that the Prophet uttered. That this is so is borne out by the use of the pronoun 'it' (*huwa*) in this *āyah*, which refers to the Qur'ān itself. The majority view adds that the occasion for the revelation (*sha'n al-nuzūl*) of this *āyah* supports this interpretation (the *āyah* was revealed in refutation of the unbelievers who claimed that the Qur'ān was the work of the Prophet himself and not the speech of God). Besides, the Prophet often resorted to reasoning by way of analogy and *ijtihād*, and did not postpone all matters until the reception of divine revelation.⁵⁶

The minority view on this subject overrules the claim to the practice of *ijtihād* by the Prophet and maintains that if it were true that the Prophet practised *ijtihād*, then disagreeing with his views would be permissible. For it is a characteristic of *ijtihād* to allow disagreement and opposition. Opposing the Prophet is, however, clearly forbidden, and obedience to him is a Qur'ānic duty upon every Muslim (al-Nisā', 4:14 and 59).

There is yet a third opinion on this point which, owing to the conflicting nature of the evidence, advises total suspension. This view is attributed to al-Shāfi'ī and upheld by al-Bāqillānī and al-Ghazālī. Al-Shawkānī, however, rejects it by saying that the Qur'ān gives us clear indications not only to the effect that *ijtihād* was permissible for

the Prophet but also that he was capable of making errors.⁵⁷ Nonetheless, the 'ulamā' who have maintained this view add that such an error is not sustained, meaning that any error the Prophet might have made was rectified by the Prophet himself or through subsequent revelation.⁵⁸ Thus we find passages in the Qur'ān which reproach the Prophet for his errors. To give an example, a text in sūra al-Anfal (8:67) provides: 'It is not proper for the Prophet to take prisoners [of war] until he has subdued everyone in the earth.'

ما كان لني أن يكون له أسرى حتى يثخن في الأرض

This *āyah* was revealed concerning the captives of the battle of Badr. It is reported that seventy persons from the enemy side were taken prisoner in the battle. The Prophet first consulted Abū Bakr, who suggested that they should be released against a ransom, whereas 'Umar ibn al-Khaṭṭāb held the view that they should be killed. The Prophet approved of Abū Bakr's view but then the *āyah* was revealed which disapproved of taking ransom from the captives. Elsewhere, in sūra al-Tawbah (9:43), in an address to the Prophet, the text provides: 'God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?' This *āyah* was revealed in regard to the exemption that the Prophet granted, prior to investigating the matter, to those who did not participate in the battle of Tabūk. These and similar passages in the Qur'ān indicate that the Prophet had on occasions acted on his own *ijtihād*. For had he acted in pursuance of a divine command, there would have been no occasion for a reprimand or the granting of divine pardon for his mistakes.⁵⁹

The majority view that the Prophet resorted to *ijtihād* finds further support in the *Sunnah*. Thus, according to one *ḥadīth*, the Prophet is reported to have said, 'When I do not receive a revelation [*wahy*], I adjudicate among you on the basis of my opinion.'⁶⁰

إنما أفتي بينكم برأى فيما لم يُسزل عليّ فيه وحي.

The next point to be raised in this connection is whether *ijtihād* was lawful for the Companions during the lifetime of the Prophet. Once again the majority of 'ulamā' have held that it was lawful, regardless of whether it took place in the presence of the Prophet or in his absence. The 'ulamā' have, however, differed on the details. Ibn Ḥazm held that such *ijtihād* is valid in matters other than the *ḥalāl* and *ḥarām*,

whereas al-Āmidī and Ibn al-Ḥajjib have observed that it is only speculative and does not establish a definitive ruling. There are still others who have held that *ijtihād* was lawful for the Companions only if it took place in the presence of the Prophet, with his permission, or if the Prophet had approved of it in some way. Those who invalidate *ijtihād* for the Companions during the lifetime of the Prophet maintain that the Companions had access to the Prophet in order to obtain the necessary authority, which would be decisive and final. If one is able to obtain a decisive ruling on a juridical matter, *ijtihād*, which is a merely speculative exercise, is unlawful.⁶¹ This view is, however, considered to be weak, as it takes for granted ready access to the Prophet; it also discounts the possibility that certain decisions had to be made by the Companions without delay. The correct view is therefore that of the majority, which is supported by the fact that the Companions did, on numerous occasions, practice *ijtihād* both in the presence of the Prophet and in his absence. The *ḥadīth* of Mu'adh ibn Jabal is quoted as clear authority that the Prophet authorised Mu'adh to resort to *ijtihād* in his absence (i.e. in the Yemen).⁶² Numerous other names are quoted, including those of Abū Bakr, Sa'd ibn Mu'adh, 'Amr ibn al-Ās and Abū Mūsā al-Ash'arī, who delivered *ijtihād* in the absence of the Prophet.⁶³ It is also reported in a *ḥadīth* that when the Prophet authorised 'Amr ibn al-Ās to adjudicate in some disputes, he asked the Prophet, 'Shall I render *ijtihād* while you are present?' To this the Prophet replied, 'Yes. If you are right in your judgement, you earn two rewards, but if you err, only one.' It is similarly reported that Sa'd ibn Mu'adh rendered a judgement concerning the Jews of Banū Qurayẓah in the presence of the Prophet, and that he approved of it.⁶⁴

VII. The Truth and Fallacy of *Ijtihād*

The jurists have differed on whether every *muftahid* can be assumed to be right in his conclusions, or whether only one of several solutions to a particular problem may be regarded as true to the exclusion of all others. At the root of this question lies the uncertainty over the unity or plurality of truth in *ijtihād*. Has Almighty God predetermined a specific solution to every issue, which alone may be regarded as right? If the answer to this is in the affirmative, then it will follow that there is only one correct solution to any juridical problem and that all others are erroneous. This would in turn beg the question of whether it is at all possible for the *muftahid* to commit a sin by render-

ing an erroneous *ijtihād*. In the face of the *ḥadīth* that promises a spiritual reward to every *muftahid* regardless of the accuracy of his conclusions, added to which is the fact that he is performing a sacred duty, is it theoretically possible for a *muftahid* to commit a sin?

The 'ulamā' are in agreement that in regard to the essentials of dogma, such as the oneness of God (*taḥdīd*), His attributes, the truth of the prophethood of Muḥammad, the hereafter, and so on, there is only one truth and anyone, whether a *muftahid* or otherwise, who takes a different view automatically renounces Islam.⁶⁵

With regard to juridical or *shar'ī* matters, the majority of 'ulamā', including the Ash'aris and the Mu'tazilah, recognise two types.

(1) Juridical matters that are determined by a clear and definitive text, such as the obligatoriness of *ṣalāh* and other pillars of the faith, the prohibition of theft, adultery, and so on. In regard to these matters, once again, there is only one truth with which the *muftahid* may not differ. Anyone who takes an exception to these commits a sin, and according to some, even heresy and disbelief.

(2) *Shar'ī* matters on which no decisive ruling is found in the sources. There is much disagreement on this. The Ash'aris and the Mu'tazilah have held the view that *ijtihād* in regard to such matters is always meritorious and partakes of truth regardless of the nature of the results. But according to the four leading imams and many other 'ulamā', only one of the several opposing views on a particular issue may be said to be correct. For it is impossible to say that one and the same thing at the same time regarding the same person could be both lawful and unlawful.⁶⁶ This view has quoted in support the Qur'anic text where in reference to the two judgements of David and Solomon on one and the same issue, God validated only one. The text runs:

And when David and Solomon both passed judgement on the field where some people's sheep had strayed to pasture there at night, We acted as Witnesses for their decision. We made Solomon understand it. To each We gave discretion and knowledge. (al-Anbiyā', 21:78-79)

وداود وسليمان إذ يحكمان في الحرث إذ نفثت

فيه غنم القوم وكنا لحكمهم شاهدين ففهمناها سليمان

وكلا آتينا حكما وعلمنا

If there could be more than one correct solution to a juridical problem, then this *āyah* would have upheld the judgements both of David and Solomon. It is thus suggested that this *āyah* confirms the unitary character of truth in *ijtihād*. Furthermore, when one looks at the practice of the Companions, it will be obvious that not only did they admit the possibility of error in their own judgements but that they also criticised one another. If all of them were to be right in their *ijtihād*, there would be no point in their criticising one another or in admitting the possibility of error in their own *ijtihād*. To give an example, the Caliph Abū Bakr is reported to have said in regard to the issue of *kalālah* (i.e. when the deceased leaves no parent or child to inherit him): 'I decided the question of *kalālah* according to my opinion. If it is correct, it is an inspiration from God; if it is wrong, then the error is mine and Satan's.'⁶⁷ It is further reported that when 'Umar ibn al-Khaṭṭāb adjudicated a case, one of the parties to the dispute who was present at the time said, 'By God this is the truth.' To this the Caliph replied that he did not know whether he had attained the truth, but that he had spared no effort in striving to do so.⁶⁸ The *ḥādīth* and the practice of the Companions on *ijtihād* clearly entertain the possibility of error in *ijtihād*. A *mujtahid* may be right or may have erred, but in either case, his effort is commendable and worthy of reward.

The opposite view, which is a minority opinion, maintains that there is no pre-determined truth in regard to *ijtihādī* matters. Almighty God has not determined one particular solution as truth to the exclusion of all others. The result of *ijtihād* may thus vary and several verdicts may be regarded as truth on their merit. This view quotes in support the same Qur'ānic text, quoted above, which in its latter part refers to David and Solomon with the words: 'To each We gave discretion and knowledge.' Had either of them committed an error, God would not have praised them thus. It is thus implied that both were right, and that every *mujtahid* attains the truth in his own way. It is further argued that had there been only one truth in regard to a particular issue, the *mujtahid* would not have been bound by the result of his own *ijtihād*. His duty to follow his own *ijtihād* to the exclusion of anyone else's suggests that every *mujtahid* attains the truth.⁶⁹ This view seeks further support in the rule of *Sharī'ah* which authorises the imam or the *mujtahid* to appoint as judge another *mujtahid* who may differ with him in *ijtihād*. This was, for example, the case when Abū Bakr appointed Zayd ibn Thābit as a judge while it was common knowledge among the Companions that Zayd had differed with Abū

Bakr on many issues. Had a difference of opinion in *ijtihādī* matters amounted to divergence from truth and indulgence in error, Abū Bakr would not have appointed Zayd to judicial office. And lastly, the proponents of this view have referred to the *ḥādīth* that reads: 'My Companions are like stars; any one of them that you follow will lead you to the right path.'

أصحابي كالنجوم بأيهم اقتديتم اهتديتم.

Had there been any substance to the idea that truth is unitary, the Prophet would have specified adherence only to those of his Companions who attained to it.⁷⁰

These differences may be resolved, as the majority of 'ulamā' suggest, in the light of the celebrated *ḥādīth*, which we quote again: 'When a judge renders *ijtihād* and gives a right judgement, he will have two rewards, but if he errs, he will still have earned one reward.' This *ḥādīth* clearly shows that the *mujtahid* is either right (*muṣṭih*) or in error (*mukhlī*), that some *mujtahidūn* attain the truth while others do not; but that sin attaches to neither as they are both rewarded for their efforts. Hence anyone who maintains that there are as many truths as there are *mujtahidūn* is clearly out of line with the purport of this *ḥādīth*. If every *mujtahid* were supposed to be right, then the division of *mujtahidūn* into two types in this *ḥādīth* would have no meaning.⁷¹

VIII. Classification and Restrictions

In their drive to impose restrictions on *ijtihād*, the 'ulamā' of *uṣūl* of the fifth/eleventh century and the subsequent period classified *ijtihād* into several categories. Initially it was divided into two types: firstly, *ijtihād* that aims to deduce the law from the evidence in the sources, often referred to as 'independent *ijtihād*'; and secondly, *ijtihād* that is concerned mainly with the elaboration and implementation of the law within the confines of a particular school, known as 'limited *ijtihād*'. During the first two and a half centuries of Islam, there was never any attempt to deny a scholar the right to find his own solutions to legal problems. It was only at a later period that the question of who was qualified to practice *ijtihād* was raised. From about the middle of the third/ninth century, the idea began to gain currency that only the great scholars of the past had enjoyed the right to practice *ijtihād*.⁷² This was the beginning of what came to be known as the 'closure of the gate of *ijtihād*'. Before the fifth/eleventh century, no trace may

be found of any attempt to classify *ijtihād* into categories of excellence. Al-Ghazālī was the first to divide *ijtihād* into two categories, as noted above.⁷³ This division was later developed into five, and eventually into seven classes. While representing the prevailing opinion of his time, al-Ghazālī admitted that independent *mujtahidūn* were already extinct.⁷⁴ About two centuries later, the number of the ranks of *mujtahidūn* reached five, and by the tenth/sixteenth century seven ranks were distinguished, while from the sixth/twelfth century onwards jurists are said to belong to only the last two categories on the scale of seven.⁷⁵ This is as follows.

(1) Full *mujtahid* (*mujtahid fi'l-shar'*). This rank is assigned to those who fulfilled all the requirements of *ijtihād*. They deduced the *ahkām* from the evidence in the sources, and in so doing were not restricted by the rules of a particular *madhhab*. The learned among the Companions, and the leading jurists of the succeeding generation, like Sa'id ibn al-Musayyib and Ibrāhīm al-Nakha'i, the leading Imams of the four schools, the leading Imams of the Shi'ah, Muḥammad al-Bāqir and his son Ja'far al-Ṣādiq, al-Awza'i and many others were identified as independent *mujtahidūn*. It is by the authority of these that consensus of opinion, analogy, juristic preference, *maṣlaḥah mursalah*, etc., were formulated and established as the secondary proofs of *Sharī'ah*.⁷⁶ Although Abū Yūsuf and al-Shaybānī are usually subsumed under the second rank, Abū Zahrah, who has written extensively on the lives and works of the leading '*ulamā'*', regards them as full *mujtahidūn*. The criteria of distinguishing the first from the second class of *mujtahidūn* is originality and independent thought. If this is deemed to be the case, the mere fact that a *mujtahid* has concurred with the opinion of another is immaterial in the determination of his rank. For many of the leading *mujtahidūn* are known to have concurred with the views of other '*ulamā'*'. For example, it is known that Abū Ḥanīfah on many occasions agreed with and followed the views of his teacher, Ibrāhīm al-Nakha'i, but this was only because he was convinced of the accuracy of his reasoning, and not out of imitation for its own sake.⁷⁷

The question arises whether this type of *ijtihād* is still open or came to an end with the so-called closure of the gate of *ijtihād*. With the exception of the Hanbalis, who maintain that *ijtihād* in all of its forms remains open, the '*ulamā'*' of the other three schools have on the whole acceded to the view that independent *ijtihād* has discontinued.⁷⁸ Another related question that has been extensively debated by the '*ulamā'*' is whether the idea of the total extinction of *mujtahidūn* at any given period or generation is at all acceptable from the viewpoint of

doctrine. Could the *Sharī'ah* entertain such a possibility and maintain its own continuation, both at the same time? The majority of the '*ulamā'*' of *uṣūl*, including al-Āmidī, Ibn al-Hājib, Ibn al-Humām, Ibn al-Subkī and Zakariyā al-Anṣārī have answered this question in the affirmative, whereas the Hanbalis have held otherwise. The Hanbalis have argued that *ijtihād* is an obligatory duty of the Muslim community, whose total abandonment would amount to an agreement on deviation/error which is precluded by the *ḥadīth* which states that 'My community shall never agree on an error.'⁷⁹

لا تجمع أمي على الضلالة.

To say that *ijtihād* is a *wājib*, whether '*aynī* or *kafā'i*', takes it for granted that it may never be discontinued. This is also the implication of another *ḥadīth* which provides that 'a section of my *ummah* will continue to be on the right path; they will be the dominant force and they will not be vanquished till the Day of Resurrection'.⁸⁰

لا تزال طائفة من أمي على الحق ظاهرين حتى تقوم الساعة.

Since the successful pursuit of truth is not possible without knowledge, the survival of *mujtahidūn* in any given age ('*ayr*') is therefore sustained by this *ḥadīth*. Furthermore, according to some '*ulamā'*', the duty to perform *ijtihād* is not fulfilled by means of limited *ijtihād* or by practising the delivery of *fatwā* alone. According to the Hanbalis, the claim that *ijtihād* has discontinued is to be utterly rejected. *Ijtihād* is not only open, but no period may be without a *mujtahid*. The Shi'ah Imamiyyah have held the same view. The Shi'ah, however, follow their recognised imams, in whose absence they may exercise *ijtihād* on condition that they adhere, both in principle and in detail, to the rulings of the Imams. In the absence of any ruling by the Imams, the Shi'ah recognise '*aql*' as a proof following the Qur'ān, the *Sunnah*, and the rulings of their Imams.⁸¹ And finally, it may be said that the notion of the discontinuation of *ijtihād* would appear to be in conflict with some of the important doctrines of *Sharī'ah*. The theory of *ijmā'* for example, and the elaborate procedures relating to *qiyās*, all proceed on the assumption that they are the living proofs of the law and presume the existence of *mujtahidūn* in every age.⁸²

(2) *Mujtahidūn* within the school. These are jurists who expounded the law within the confines of a particular school while adhering to the principles laid down by their Imams. Among the prominent names

that feature in this category are Zufar ibn al-Hudhayl, Hasan ibn Ziyād in the Hanafī school; Ismā'īl ibn Yahyā al-Muzanī, 'Uthman Taqī al-Dīn ibn al-Shālāh and Jalāl al-Dīn al-Suyūṭī in the Shāfi'i; Ibn 'Abd al-Barr and Abū Bakr ibn al-'Arabī in the Mālikī, and Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah in the Hanbali schools. It is observed that although these 'ulamā' all followed the doctrines of their respective schools, nevertheless they did not consider themselves bound to follow their masters in the implementation of the general principles or in arguments concerning particular issues. This is borne out by the fact that they have held opinions that were opposed to those of their leading Imams.⁸³

(3) *Mujtahidūn* on particular issues. These are jurists who were competent to elucidate and apply the law in particular cases which were not settled by the jurists of the first and second ranks. They did not oppose the leading *mujtahidūn* and generally followed the established principles of their schools. Their main preoccupation was to elaborate the law on fresh points that were not clearly determined by the higher authorities. Scholars like Abu'l-Hasan al-Karkhī and Abū Ja'far al-Taḥāwī in the Hanafī school, Abū al-Faḍl al-Marwazī and Abū Ishāq al-Shirāzī in the Shāfi'i, Abū Bakr al-Abhārī, in the Mālikī and 'Amr ibn Husayn al-Khiraqī in the Hanbali schools have been placed in this category.

All the preceding three classes were designated as *mujtahidūn*, but the remaining four classes of 'ulamā', as described below have been classified as imitators.⁸⁴

(4) The so-called *aṣḥāb al-takhrīj*, who did not deduce the *ahkām* but were well conversant in doctrine and were able to indicate which view was preferable in cases of ambiguity, or regarding suitability to prevailing conditions.⁸⁵

(5) The *aṣḥāb al-tarjīḥ* are those who were competent to make comparisons and distinguish the correct (*ṣaḥīḥ*), the preferred (*rājih*, *arjah*) and the agreed upon (*muftā bihā*) views from the weak ones. Authors like 'Alī al-Dīn al-Kāsānī and Burhān al-Dīn al-Marghinānī of the Hanafī school, Muḥyī al-Dīn al-Nawawī of the Shāfi'i, Ibn Rushd al-Qurṭubī of the Mālikī and Muwaffaq al-Dīn ibn Qudāmah of the Hanbali schools and their equals have been placed in this category.⁸⁶

(6) The so-called *aṣḥāb al-taḥṣīṭ*: those who could distinguish between the manifest (*ẓāhir al-rivāyah*) and the rare and obscure (*al-nawādir*) views of the schools of their following. Textbook writers whose works are in use in the various *madhāhib* are said to fall into this category.⁸⁷

It will be noted here that the previous three categories are somewhat overlapping and could be unified under one category to comprise all those who drew comparisons and evaluated the strengths and weaknesses of the existing views.

(7) And finally the *muqallidūn*, or the 'imitators', who lack the abilities of the above and comprise all who do not fall into any of the preceding classes. It is said concerning them: 'They do not distinguish between the lean and the fat, right and left, but get together whatever they find, like the one who gathers wood in the dark of the night.'⁸⁸

While referring to this classification, Aghnides is probably right in observing that 'it implies a gratuitous assumption that the latter *mujtahidūn* could not show greater independence of thought'.⁸⁹ The restrictions that were imposed on *ijtihād* and the ensuing phenomenon of the 'closing of its gate' are, in the most part, an historical development that could find little if any support in the legal theory of *ijtihād*. Similarly, the notion that the 'ulamā', at around the beginning of the fourth century, reached such an immutable consensus of opinion that further *ijtihād* was unnecessary is ill-conceived and untenable.⁹⁰ The mendacity of such a claim is attested by the rejection on the part of numerous 'ulamā', including those of the Hanbali school and the Shī'ah Imamiyyah, of the validity of such a consensus.

An early influence in the direction of a return to original *ijtihād* was the Hanbali jurist-theologian Ibn Taymiyyah, and his disciples, who inspired the renewed call for the practice of *ijtihād*, especially on the part of the Wahhabi and the Salafiyyah movements in the Hijaz. Authors throughout the Muslim world have begun to criticise *taqlīd* and advocate the continued validity of *ijtihād* as a divinely prescribed legal principle. A number of most prominent 'ulamā', including Shāh Wali Allāh, Muḥammad ibn Ismā'īl al-Ṣan'ānī, Muḥammad ibn 'Alī al-Shawkānī and Ibn 'Alī al-Sanūsī led the call for the revival of *ijtihād*.⁹¹ The nineteenth century Salafiyyah movement in the Hijaz advocated the renovation of Islam in the light of modern conditions and the total rejection of *taqlīd*.

Al-Shawkānī (d. 1839 AD) vehemently denies the claim that independent *mujtahidūn* have become extinct, a claim that smacks of 'crass ignorance and is utterly to be rejected'. The same author goes on to name a number of prominent 'ulamā' who have achieved the highest rank of erudition in *Sharī'ah*. Among the Shāfi'is, for example, at least six such 'ulamā' can be named who have fulfilled, in an uninterrupted chain of scholarship, all the requirements of *ijtihād*. These

are 'Izz al-Dīn ibn 'Abd al-Salām and his disciple, Ibn Daqīq al-'Id, then the latter's disciple Muḥammad ibn Sayyid al-Nās, then his disciple Zayn al-Dīn al-'Irāqī, his disciple Ibn Ḥajar al-'Asqalānī, and his disciple, Jalāl al-Dīn al-Suyūṭī. That they were all full *mujtahidūn* is attested by the calibre of their works and the significant contributions they have made to the *Sharī'ah*. The first two of these are particularly prominent. In his well-recognised juristic work, *al-Bahr al-Muḥīt*, Muḥammad ibn 'Abd Allāh al-Zarkashī has acknowledged that they had both attained the rank of *mujtahid*. 'It is utter nonsense' writes al-Shawkānī, 'to say that God Almighty bestowed the capacity for knowledge and *ijtihād* on the bygone generations of 'ulamā' but denied it to the later generations.' What the proponents of *taqlīd* are saying to us is that we must know the Qur'ān and the *Sunnah* through the words of other men while we still have the guidance in our hands. Praise be to God, this is the greatest lie and there is no reason in the world to vindicate it.⁹²

Iqbal Lahori considers the alleged closure of the gate of *ijtihād* to be 'a pure fiction' suggested partly by the crystallisation of legal thought in Islam and partly by that intellectual laziness that, especially in periods of spiritual decay, turns great thinkers into idols. Iqbal continues: if some of the later doctors have upheld this fiction, 'modern Islam is not bound by this voluntary surrender of intellectual independence'.⁹³

Abū Zahrah is equally critical of the alleged closure of the door of *ijtihād*. How could anyone be right in closing the door that God Almighty has opened for the exertion of the human intellect? Anyone who has advanced this claim could surely have no convincing argument to prove it. Abū Zahrah continues: the fact that *ijtihād* has not been actively pursued has had the chilling effect of moving the people further away from the sources of the *Sharī'ah*. The tide of *taqlīd* has carried some so far as to say that there is no further need to interpret the Qur'ān and *ḥadīth* now that the door of *ijtihād* is closed. In Abū Zahrah's phrase, 'nothing is further from the truth, and we seek refuge in God from such excesses'.⁹⁴

Conclusion

The conditions under which *ijtihād* was formerly practised by the 'ulamā' of the early periods are no longer what they were. For one thing, the prevalence of statutory legislation as the main instrument of government in modern times has led to the imposition of further restrictions on *ijtihād*. The fact that the law of the land in the majority

of Islamic countries has been confined to the statute book, and the parallel development whereby the role of interpreting the statute has also been assigned to the courts of law, has had, all in all, a discouraging effect on *ijtihād*. The *mujtahid* is given no recognised status, nor is he required to play a definite role in legislation or the administration of justice in the courts. This is confirmed by the fact that many modern constitutions in present-day Muslim countries are totally silent on *ijtihād*. It was this total neglect of *ijtihād* that prompted Iqbal Lahori to propose, in his well-known work *The Reconstruction of Religious Thought in Islam*, that the only way to utilise both *ijmā'* and *ijtihād* (which he refers to as the 'principle of movement') into the fabric of modern government is to institutionalise *ijtihād* by making it an integral feature of the legislative function of the state.⁹⁵

Essentially the same view has been put forward by al-Tamāwī, who points out that *ijtihād* by individuals in the manner that was practised by the *fuqahā'* of the past is no longer suitable to modern conditions. The revival of *ijtihād* in our times would necessitate efforts that the government must undertake. Since education is the business and responsibility of modern governments, it should be possible to provide the necessary education and training that a *mujtahid* would need to possess, and to make attainment to this rank dependent on special qualifications. Al-Tamāwī further recommends the setting up of a council of qualified *mujtahidūn* to advise in the preparation and approval of statutory law so as to ensure its harmony with *Sharī'ah* principles.⁹⁶

This is, of course, not to say that the traditional forms of learning in the *Sharī'ah* disciplines, or of the practice of *ijtihād*, are obsolete. On the contrary, the contribution that the 'ulamā' and scholars can make, in their individual capacities, to the incessant search for better solutions and more refined alternatives should never be underestimated. It is further hoped that, for its part, government will also play a positive role in preserving the best heritage of the traditional modes of learning, and encourage the 'ulamā' to enhance their contribution to law and development. Universities and the legal professions in many Islamic countries are currently committed to the training of lawyers and barristers in the modern law stream. To initiate a comprehensive and well-defined programme of education for prospective *mujtahidūn*, which would combine training in both the traditional and modern legal disciplines, would not seem to be beyond the combined capabilities of universities and legal professions possessed of long-standing experience in Islamic legal education.

Furthermore, in a *Shari'ah*-oriented government it would seem desirable that the range of selection to senior advisory, educational and judicial posts would include the qualified *mujtahidūn*. This would hopefully provide the basis for healthy competition and incentives for high performance among the candidates, and help to create a definite role for them in the various spheres of government.

Two reform measures need to be taken in order to make *ijtihad* a viable proposition. Firstly, *ijtihad* in modern times needs collective endeavour so as to combine the skill and contribution not only of the scholars of *Shari'ah*, but of experts in various disciplines. This is because a total mastery of all the relevant skills that are important to contemporary society is difficult for any one individual to attain. We need to combine *ijtihad* with the Qur'anic principle of consultation (*shūrā*) and make *ijtihad* a consultative process. The second point to be proposed concerning *ijtihad* is related to the first in that *ijtihad* has in the past been seen as a juristic concept and remained the first preserve of the jurist (*mujtahid*). This might have been due to the fact that the *Shari'ah* dominated nearly all other fields of Islamic scholarship. But *ijtihad* in the sense of self-exertion is a method of finding solutions to new issues in light of the guidance of *wahy*. It is in this sense a wider proposition that may be exercised by scholars of *Shari'ah* as well as experts in other disciplines, provided that the person who attempts it acquires mastery of the relevant data, especially in the Qur'an and the *Sunnah*, pertaining to his subject.

The non-revealed sources of *Shari'ah*, such as general consensus, analogical reasoning and juristic preference, are all sub-varieties of *ijtihad*. They serve the purpose, each in their respective capacity, to relate the general principles of *Shari'ah* to new issues. These are nearly all rationalist doctrines that enable the qualified scholar to find fair and reasonable solutions to problems as they arise. The detailed methods and procedures that each of these doctrines proposes are founded on the premise that the law of Islam was not given and delivered all at once. The idea, in other words, that the law must evolve and keep abreast with social reality lies at the root of *ijtihad* and all its subdivisions. Some of the doctrines of *uṣūl*, such as *maṣlaḥah*, *istiḥāb* and *istiḥsān*, hold great potential for diversifying the substance of *ijtihad*. Yet the conventional *uṣūl* has subjected most of these to a variety of conditions which tends to suppress their originality and potential. These can now be utilised perhaps each as a means of injecting fresh impetus into *ijtihad* in order to enhance the adaptability of law to social reality. One way of doing this would be an explicit recognition

of doctrines such as *maṣlaḥah* and *istiḥsān* and the ways they can be utilised in contemporary legislative and judicial processes. We note, for example, that *maṣlaḥah* relates more meaningfully to legislation, while *istiḥsān* involves making necessary exceptions and refinements in the existing law and may therefore relate better to the process of adjudication, although the potential contribution of *istiḥsān* to legislation and reforming certain aspects of the *Shari'ah* may also be realised.

NOTES

- Islāhī (*Islamic Law*, p. 109) has thus aptly stated: 'There are three prominent and fundamental sources of Islamic Law: the Holy Qur'ān, the *Sunnah* of the Holy Prophet and *ijtihad*.'
- Amīdī, *Iḥkām*, IV, 162; Shawkālī, *Iḥdād*, p. 250; Khudārī, *Uṣūl*, p. 367.
- Abū Zahrah, *Uṣūl*, p. 301.
- Shawkālī, *Iḥdād*, p. 250; Zuhayr, *Uṣūl*, IV, 223-5; Badrān, *Uṣūl*, p. 471.
- Ghazālī, *Mustaṣfā*, II, 102; Amīdī, *Iḥkām*, IV, 162.
- Shawkālī, *Iḥdād*, p. 150.
- Ibid.*, p. 252; Zuhayr, *Uṣūl*, IV, 225; Aghnides, *Muhammadan Theories*, p. 91; Badrān, *Uṣūl*, p. 471.
- Kasāb, *Adwā'*, p. 29; Badrān, *Uṣūl*, p. 473.
- Abū Dāwūd, *Sunan* (Hasan's trans.), II, 407, *ḥadīth* no. 1562.
- Kasāb, *Adwā'*, p. 30; Badrān, *Uṣūl*, p. 474.
- Abū Dāwūd, *Sunan* (Hasan's trans.), I, 209, *ḥadīth*, no. 819.
- Shawkālī, *Iḥdād*, p. 253; Khudārī, *Uṣūl*, p. 368; Zuhayr, *Uṣūl*, IV, 217.
- Ghazālī, *Mustaṣfā*, II, 121; Amīdī, *Iḥkām*, IV, 204; Kasāb, *Adwā'*, p. 119.
- Amīdī, *Iḥkām*, IV, 14; Khudārī, *Uṣūl*, p. 38.
- Amīdī, *Iḥkām*, IV, 206; Kasāb, *Adwā'*, p. 121.
- Amīdī, *Iḥkām*, IV, 14; Khudārī, *Uṣūl*, p. 380.
- Ibn Qayyim, *Fāim*, I, 177; Kasāb, *Adwā'*, p. 108; Badrān, *Uṣūl*, p. 485.
- Ibid.*
- Ghazālī, *Mustaṣfā*, II, 120; Amīdī, *Iḥkām*, IV, 184; Ibn Qayyim, *Fāim*, I, 71-72; Mahmassānī, *Falaḥ* (Ziadeh's trans.), p. 97.
- Abū Dāwūd, *Sunan*, III, 1019, *ḥadīth* no. 3585.
- Ghazālī, *Mustaṣfā*, II, 63-4.
- Abū Dāwūd, *Sunan*, III, 101-3, *ḥadīth* no. 3567.
- Ghazālī, *Mustaṣfā*, II, 105; Amīdī, *Iḥkām*, IV, 186.
- Bukhārī, *Ṣaḥīḥ* (Istanbul ed.), VI, 84; Amīdī, *Iḥkām*, IV, 209.
- Ibid.*, I, 25-6.
- Ibn Mājah, *Sunan*, I, 81, *ḥadīth* no. 224; Amīdī, *Iḥkām*, IV, 230, 234; Shāṭibī, *Muwāḍa'āt*, IV, 140.
- Ibn Qayyim, *Fāim*, I, 176; Mahmassānī, *Falaḥ*, p. 95; Kasāb, *Adwā'*, p. 19.
- Ghazālī, *Mustaṣfā*, II, 106; Ibn Qayyim, *Fāim*, I, 176; Kasāb, *Adwā'*, p. 19.
- Cf. Kasāb, *Adwā'*, p. 20.

30. Cf. Hallaq, 'Gate of Ijtihad', pp. 14-17.
31. Ghazālī, *Mustaṣfā*, II, 102; Abū Zahrah, *Uṣūl*, p. 30.
32. Shāṭibī, *Muwāḍḍaʿāt*, IV, 6.
33. Ghazālī, *Mustaṣfā*, II, 101.
34. Shawkānī, *Inḥād*, pp. 250-1; Abū Zahrah, *Uṣūl*, p. 304; Zuhayr, *Uṣūl*, IV, 226.
35. Shawkānī, *Inḥād*, pp. 251ff; Abū Zahrah, *Uṣūl*, p. 304.
36. Ghazālī, *Mustaṣfā*, II, 101; Shawkānī, *Inḥād*, p. 251; Aḥqar, *Tarīkh*, p. 233.
37. Shawkānī, *Inḥād*, p. 251; Ghazālī, *Mustaṣfā*, II, 101; Abū Zahrah, *Uṣūl*, p. 305.
38. Ghazālī, *Mustaṣfā*, II, 54; Shawkānī, *Inḥād*, p. 252; Abū Zahrah, *Uṣūl*, p. 306.
39. Shawkānī, *Inḥād*, p. 252; Abū Zahrah, *Uṣūl*, p. 307; Badrān, *Uṣūl*, p. 208.
40. Shāṭibī, *Muwāḍḍaʿāt*, IV, 56; Abū Zahrah, *Uṣūl*, p. 307.
41. Abū Zahrah, *Uṣūl*, pp. 308-9; Ghazālī, *Mustaṣfā*, II, 103) considers a knowledge of Arabic, *ḥadīth* and *uṣūl al-fiqh* to be essential to *ijtihād*. However, the requirement concerning the knowledge of *uṣūl* would seem to be repetitive in view of the separate conditions that the *mujtahid* must fulfil, such as the knowledge of *qiyās* and other such requirements which fall under the subject of *uṣūl*.
42. Ghazālī, *Mustaṣfā*, II, 101; Shawkānī, *Inḥād*, p. 252.
43. Ghazālī, *Mustaṣfā*, II, 102-3; Kassāb, *Aḍwāʾ*, p. 38.
44. Cf. Fazlur Rahman, *Islam*, p. 78.
45. Abdur Rahim, *Jurisprudence*, p. 174.
46. Hallaq, 'Gate of Ijtihad', p. 14.
47. Shawkānī, *Inḥād*, p. 254; Abū Zahrah, *Uṣūl*, p. 318; Badrān, *Uṣūl*, p. 486.
48. Āmidī, *Iḥkām*, IV, 204; Shawkānī, *Inḥād*, p. 255.
49. Kassāb, *Aḍwāʾ*, p. 96.
50. Shawkānī, *Inḥād*, p. 255; Abū Zahrah, *Uṣūl*, p. 318; Badrān, *Uṣūl*, p. 486.
51. Ghazālī, *Mustaṣfā*, II, 103; Shawkānī, *Inḥād*, p. 255; Badrān, *Uṣūl*, p. 486.
52. Shirāzī, *Lumaʾ*, pp. 83-4.
53. Shāṭibī, *Risālah*, pp. 261-2; Shawkānī, *Inḥād*, p. 258.
54. Kassāb, *Aḍwāʾ*, p. 24; Hallaq, 'Gate of Ijtihad', p. 12.
55. Shawkānī, *Inḥād*, p. 155.
56. Ibid. p. 256; Zuhayr, *Uṣūl*, IV, 227.
57. Shawkānī, *Inḥād*, p. 256; Ghazālī, *Mustaṣfā*, II, 104.
58. Kassāb, *Aḍwāʾ*, p. 61.
59. Shawkānī, *Inḥād*, p. 256; Ghazālī, *Mustaṣfā*, II, 104; Kassāb, *Aḍwāʾ*, p. 61.
60. Abū Dāwūd, *Sunan* (Hasan's trans.), III, 1017, *ḥadīth* no. 3578; Kassāb, *Aḍwāʾ*, p. 58. For other *ḥadīth* on this point see Shawkānī, *Inḥād*, p. 256.
61. Shawkānī, *Inḥād*, p. 257; Zuhayr, *Uṣūl*, IV, 234.
62. Ghazālī, *Mustaṣfā*, II, 104.
63. Shawkānī, *Inḥād*, p. 257; Zuhayr, *Uṣūl*, IV, 237.
64. Shawkānī, *Inḥād*, p. 257; Kassāb, *Aḍwāʾ*, p. 80. Ghazālī has however expressed some reservations about the validity of *ijtihād* in the presence of the Prophet, as he considers that unless the Prophet granted permission, *ijtihād* in his presence would be discourteous (*Mustaṣfā*, II, 104).
65. Shawkānī, *Inḥād*, p. 259.
66. Ibid., pp. 160-1; Zuhayr, *Uṣūl*, IV, 338.
67. Āmidī, *Iḥkām*, IV, 187; Ibn Qayyim, *Iʿlām*, I, 177.

68. Āmidī, *Iḥkām*, IV, 187.
69. Shawkānī, *Inḥād*, p. 262; Zuhayr, *Uṣūl*, IV, 139; Kassāb, *Aḍwāʾ*, pp. 101-3.
70. Shawkānī, *Inḥād*, p. 262; Āmidī, *Iḥkām*, IV, 152; Zuhayr, *Uṣūl*, IV, 241.
71. Shawkānī, *Inḥād*, p. 261.
72. Cf. Schacht, 'Ijtihad', *Encyclopedia of Islam*, IV, 1029.
73. Hallaq, 'Gate of Ijtihad', p. 18.
74. While quoting Ghazālī's statement, Shawkānī (*Inḥād*, p. 253) considers it of questionable validity, and adds that Ghazālī almost contradicted himself when he said that he did not follow Shāfi'ī in all of his opinions.
75. A more detailed account of the historical developments concerning the classification of *ijtihād* can be found in Hallaq, 'Gate of Ijtihad', p. 80ff.
76. Abū Zahrah, *Uṣūl*, p. 310; Kassāb, *Aḍwāʾ*, p. 38; Abdur Rahim, *Jurisprudence*, pp. 182-3.
77. Ibid.
78. While stating the position of the three Sunni schools on the point, Abū Zahrah (*Uṣūl*, p. 311) adds that this is not definite as, for example, some Hanafīs have considered Kamāl al-Dīn ibn al-Humāmī as a *mujtahid* of the first class.
79. Muslim, *Sahīh*, p. 290, *ḥadīth* no. 1095; Shawkānī, *Inḥād*, p. 253; Ghazālī, *Mustaṣfā*, I, 111.
80. Ibid.
81. Abū Zahrah, *Uṣūl*, p. 312; Kassāb, *Aḍwāʾ*, p. 112.
82. Cf. Abdur Rahim, *Jurisprudence*, p. 174.
83. Abū Zahrah, *Uṣūl*, p. 312; Kassāb, *Aḍwāʾ*, p. 39; Abdur Rahim, *Jurisprudence*, p. 183.
84. Abū Zahrah, *Uṣūl*, p. 314; Kassāb, *Aḍwāʾ*, p. 40; Aghnides, *Muhammadian Theories*, p. 95; *Maṭnī'ah Jamāl*, I, 253 and VII, 387.
85. Abū Zahrah, *Uṣūl*, p. 315; Kassāb, *Aḍwāʾ*, p. 40; Aghnides, *Muhammadian Theories*, p. 96.
86. Ibid.
87. Ibid.
88. Abū Zahrah, *Uṣūl*, p. 316.
89. Aghnides, *Muhammadian Theories*, p. 96.
90. Cf. Weiss, 'Interpretation', p. 208.
91. Further details on developments in the Hijaz and in the Indian Subcontinent can be found in Fazlur Rahman, *Islam*, pp. 197ff; Enayat, *Modern Islamic Political Thought*, pp. 63ff.
92. Shawkānī, *Inḥād*, p. 154.
93. Iqbal, *Reconstruction*, p. 178.
94. Abū Zahrah, *Uṣūl*, p. 318.
95. Lahori, *The Reconstruction*, p. 174.
96. Tamawī, *Subuṭ*, p. 307.

CHAPTER TWENTY

A New Scheme for *Uṣūl al-fiqh*

Uṣūl al-fiqh is one of the most distinctive areas of Islamic learning, a 'mother' discipline in *Sharī'ah*, and a genuine manifestation of Islamic thought and scholarship throughout its long history of development. Its pervasive influence on almost all other branches of Islamic learning has consistently placed *uṣūl al-fiqh* at the head of the academic and educational curricula of Islam. However, owing to a variety of factors, *uṣūl al-fiqh* is no longer capable of serving the goals for which it was originally designed and developed. *Uṣūl al-fiqh* has often been described as a theoretical discipline that has lost touch with the realities of social change, and its effectiveness in stimulating *ijtihād* on new issues has been increasingly called into question.

As we note, the doctrines and methods of *uṣūl al-fiqh*, such as *ijmā'*, *qiyās*, *istihsān* and *istiṣlāh*, are conspicuously absent in the legislative and judicial decision-making processes of contemporary Muslim countries. This chapter enquires into the reasons behind the gap that has increasingly isolated *uṣūl al-fiqh* from statutory legislation, and then proposes an umbrella scheme with a view to bridging the gap between the theory and practice of this discipline. Specific issues pertaining to the various doctrines of *uṣūl al-fiqh*, including *ijtihād*, *ijmā'*, *qiyās*, *istihsān* and *istiṣlāh*, have already been identified and discussed in the relevant chapters of this book, together with reform proposals that seek to improve the inner working and methodology of these doctrines. I have discussed reform proposals concerning these doctrines in my concluding remarks to the various chapters. I take the opportunity now to examine the general scheme of *uṣūl al-fiqh* and explore the possibilities of greater consolidation and coherence between its various parts. The

changes I discuss in the following pages also seek to enhance the utility and relevance of the discipline to statutory legislation. I shall, at the outset, draw attention to issues regarding the theoretical orientations of *uṣūl al-fiqh*, and the role of the time-space factor in its methodology; I shall then expound upon a new scheme for its reorganisation and reform.

I. Theoretical Orientations of *Uṣūl al-Fiqh*

Uṣūl al-fiqh is often described as a theoretical, rather than empirical, discipline, which is studied more for its own sake than as a means by which to develop the law in relation to new issues. This is one of the problems of the legal theory of *uṣūl*, which took a turning for the worse with the domination of *taghlid* around the fourth/tenth century. With the so-called closure of the door of *ijtihād*, the '*ulamā'*' resorted less and less to the sources of *Sharī'ah* for finding solutions to problems. Instead of addressing social issues and attempting to find new solutions, the '*ulamā'*' of later ages (*al-muta'akhkhiṇān*) occupied themselves mainly with the elaboration, annotation, abridgement, summaries and glossaries of the works of their predecessors. At first, *ijtihād* was discouraged. Then in the fifth/eleventh and sixth/twelfth centuries, scholars were restricted to *tafṣīh*, or giving preference to the opinion of one imam or another on questions of *fiqh*. However, *tafṣīh* was also discouraged and scholars were restricted to choosing between rulings within a single *madhhab*. In this way 'the door to independent legal thought was shut and then barred.'¹ With the development of a gap between legal theory and practice, there then came a stage where *uṣūl al-fiqh* began to be used as a means by which to justify *taghlid*. Imitators studied the *uṣūl* and utilised its methodology in order to defend their unquestioning conformity to the established doctrines of the past. Unwarranted references to the general consensus, or *ijmā'*, of the '*ulamā'*' of the past over one ruling or another proliferated, and often minor and relatively obscure opinions were elevated to the rank of *ijmā'*.² The methodology of *uṣūl*, which was primarily designed to regulate and encourage *ijtihād*, was then used for purposes that were alien to its original intention.

A certain lag between the theory and practice of a discipline is admittedly not unexpected. Theoretical articulation often follows practical development. It is not surprising, therefore, to note that *uṣūl al-fiqh* had a certain degree of theoretical orientation even during the era of *ijtihād*. The question has thus arisen, and debated in many a

reputable text of *uṣūl*, as to which came into being first, *fiqh* or *uṣūl al-fiqh*, the law itself or the theory and sources of law?³ One of the two opposing answers to this question has it that *fiqh* could not have developed without its sources, and this would mean that *uṣūl al-fiqh* preceded *fiqh*. But it seems more likely that *fiqh* preceded *uṣūl al-fiqh*. *Fiqh* began to develop during the lifetime of the Prophet, at a time when there was no urgent need for a methodology, and this situation continued unchanged during the period of the Companions. Important developments in *uṣūl* occurred only during the second/eighth and early third/ninth centuries.⁴ As one observer commented, '*uṣūl al-fiqh* was a retrospective construct...Indications are that *uṣūl al-fiqh* was a manner of systematising positive law that had already been arrived at largely as a result of local and other needs without necessary recourse to the sources.'⁵

The theoretical orientation of *uṣūl* persisted even after it was articulated and refined. In historical terms, the articulation of the doctrines of *uṣūl* took place around the early third century, that is, in the last third of the three centuries of *ijtihād*. Thus, the main purpose for which the theory was supposed to be utilised, namely, to regulate *ijtihād*, was soon beginning to decline. Furthermore, many of the doctrines of *uṣūl* remained controversial and were increasingly subjected to technicalities and stipulations that tended to erode their effectiveness. The increased complexity of doctrines such as *qiyās* and *istiḥṣān*, and conditions such as unanimity and universal consensus as a prerequisite of *ijmā'* were bound to affect the practical utility of these doctrines.

The legal theory that al-Shāfi'i articulated in his *Risālah* was not burdened with technicality and regimentation of the kind that were subsequently webbed into it by the proponents of *taqlīd*. These later additions were in turn not so much motivated by the ideal of accommodating social changes as by the concern to preserve the heritage and traditions of the past. Some of the complexities of Hellenistic thought and logic found their way into *uṣūl al-fiqh* and moved it further away from the realities of social life.⁶ There is little doubt that some of the doctrines of *uṣūl* such as *ijmā'* and *qiyās* were partly designed to encourage stability and curb the influence of foreign traditions into the *corpus juris* of Islam. Evidence also suggests that the development of *uṣūl* was influenced by the rift over legitimacy between the '*ulamā'*' and rulers. While the '*ulamā'*' refused to acknowledge to the rulers the authority to legislate and interpret the *Sharī'ah*, the rulers denied the '*ulamā'*' a share in political power. The fact, for example, that Imam al-Shāfi'i wrote so strongly against *istiḥṣān* and

equated it with caprice and arbitrary tampering with *Sharī'ah* was designed partly to deny the political rulers the opportunity to circumvent the *muṣṣṣ* and *ijmā'* on grounds of political expediency and preference.

Abu Sulayman has spoken of the lack of empiricism in the works of the '*ulamā'*' and their reliance on 'deduction from the Islamic texts as their main method in acquiring knowledge...and not much attention was paid to developing systematic rational knowledge pertaining to law and social structure.'⁷ He then states that in regard to other subjects, such as medicine, mathematics and geography, Muslim scholars relied on text and reason. They were empirical, experimental and applied both induction and deduction.⁸ However, this was not the case in conventional *uṣūl*, which was 'developed in response to the needs of maintaining the classical social system of the dynastic period.' With the emergence of the rapidly changing industrial society 'the classical frame of analysis is no longer workable or acceptable.'⁹

The gap between theory and practice grew wider as a result of the fact that *uṣūl al-fiqh* was developed, like the rest of Islamic law, by private jurists who worked in isolation from government. The '*ulamā'*' were not involved in the practicalities of government and their relations with government authorities were often less than amicable. Juristic doctrines were often advanced and elaborated without involving government policy. Note, for example, that nearly all the instances of *ijmā'* that are cited in the textbooks refer to the consensus of '*ulamā'*' and private jurists, there being hardly a single record of a government-sponsored assembly of the learned to have acted as a vehicle of *ijmā'*, or even of *ijmā'* in which the government played a visible role. For their part, the government authorities seem to have condoned and encouraged *taqlīd* as this meant that leadership and initiative in both political and legal spheres rested with the government in power. The '*ulamā'*' were consequently left to their own devices to utilise and even modify the legal theory so as to suit the requirements of *taqlīd*.

The early '*ulamā'*' denied the increasingly secular Umayyad rulers the legitimacy to legislate or to interpret the law, and the rift became more visible under the Abbasids who did not allow the '*ulamā'*' a share in political power. Thus the struggle over legitimacy had 'a serious negative influence in changing the sound psychological and rational environment created by the Prophet and which had dominated earlier periods.'¹⁰ The rulers strove to enhance the role and authority of reason over the texts, as this would give them freedom in the

sphere of legislation, but the 'ulamā' were keen to deny them that very freedom. It was against this background that they articulated the methodology of *uṣūl* in order to minimise abuse of power by the rulers and their liberty with the *Sharī'ah*. Imam al-Shāfi'i's attempt, for example, to equate *ijtihād* with *qiyās* as two terms with the same meaning was clearly indicative of a purpose to minimise the role of independent reasoning in the development of *Sharī'ah*. The wider scope of reasoning was thus to be reduced to only one form, that is, analogical reasoning. The result was a certain 'distortion of issues, arbitrariness and spread of spurious materials within the fabric of *uṣūl al-fiqh*'.¹¹

The 'ulamā's assertion that there was no further need for original *ijtihād* (i.e. the closure of the door of *ijtihād*) was prompted by the struggle for legitimacy, and this was a step that could only have been taken in an atmosphere of despondency at a time when Islamic thought and scholarship had lost enthusiasm for originality and renewal.¹² It seems that the problem of legitimacy persisted, and helped to alienate the 'ulamā' from the political leaders in Muslim societies. The pattern that has prevailed during the era of nationalism and constitutional government is also one of isolation between the 'ulamā and government, although for different reasons. It now appears that the popular vote, rather than the approval of the 'ulamā', is seen as a legitimising force in politics. The advent of constitutionalism and government under the rule of law brought with it the hegemony of statutory legislation, which has largely dominated legal and judicial practice in Muslim societies. The government and its legislative branch tend to act as the sole repository of legislative power. The 'ulamā' have no recognised role in legislation, and the role and relevance of *uṣūl* to the applied law of the land appears to have become even more uncertain and remote.

II. The Time-Space Factor

The legal theory of *uṣūl* falls short of integrating the time-space factor into the fabric of its methodology. This is also a *taqlid*-related phenomenon and is reflective of an influence that fails to comply with the Qur'anic teachings on rational enquiry and pragmatism in finding effective solutions to problems.¹³ One can vividly see the role of the time-space factor in the early history of the Qur'an when we compare its Meccan and Medinan portions. The Qur'an took into account the prevailing conditions of Arabian society, which were reflected not

only in the substantive laws that it introduced in each phase, but also in the occasions of its revelation (*asbab al-nuzūl*), the form and style of its language, the intensity of its appeal and the psychology of its discourse.

The fact that the Qur'an was revealed gradually over a period of twenty-three years is itself testimony to its regard for changes of circumstances in the life of the nascent community. God Most High revealed His message to the people with consideration of their capacity for receiving it and the realities with which they were surrounded in Mecca and Medina respectively.¹⁴ We note, for example, that Muslims were not allowed to fight with non-Muslims when they were a minority in Mecca, but were later allowed to do so when they formed a community and government of their own in Medina; when in Medina, the Qur'an initially instructed peaceful relations with the Jews, but then envisaged a different scenario when relations with the Jews became increasingly hostile.

The time-space factor is also the principal cause behind the incidence of abrogation (*naskh*) in the Qur'an and Sunnah. *Naskh* is by and large a Medinan phenomenon that occurred as a result of the changes the Muslim community experienced following the Prophet's migration to Medina. Certain rules were introduced at an early stage of the advent of Islam at a time when Muslims were a minority in a dominantly non-Muslim environment. Later, when they acquired sovereign authority, some of the earlier laws were abrogated and replaced by new legislation.¹⁵

In a section entitled 'The Danger of Too-Literal an Interpretation of the Sunnah', al-'Alwānī has highlighted the 'dictionary-based culture' that prevailed over the climate of Islamic scholarship and gave rise to a 'literalist approach which relied heavily on dictionary-oriented interpretation', at the total neglect of 'the time-space factor, thus lending strength to factors which impeded the renaissance of the *ummah*'.¹⁶ This was a departure from the spirit of the Prophetic Sunnah, which was a living reality and guide for daily life and took full cognisance of the prevailing conditions. The confusion became apparent with the onset of a mentality that 'the exact circumstances which brought about a *hadith*, could be repeated many times, which is impossible in real life'.¹⁷

The failure in classical jurisprudence to admit the time-space factor into the fabric of its methodology of interpretation and *ijtihād* has added to the problem of the authenticity of Sunnah. When a certain circumstantial instruction of the Prophet is taken to be the embodiment

of a permanent *Sunnah*, it is no longer enough to verify the basic outline and message of the reported *Sunnah*, but the precise wording as well; and this is extremely difficult. Neglect of the time-space factor in the treatment of *Sunnah* has added to the problem of its authenticity, especially when the *hadith* is read without proper consideration and understanding of the effect of space-time on concrete situations.¹⁸ Abu Sulayman has observed that simple and direct deductions from specific textual materials 'without properly accounting for changes involving the space-time element of the early Muslim period is a retrogressive step'.¹⁹ We may refer, for illustration, to the debate over the purpose and import of the Qur'anic text stating that a smaller number of Muslim warriors would overcome, by dint of their commitment, perseverance and sacrifice, a larger number of enemy soldiers (see Al-Anfāl, 8:66). Commentators have focused attention entirely on the numbers involved and are preoccupied with questions of whether or not it is permissible to flee from battle if the enemy forces are less than double, and so on.²⁰ The debate here ignores the point, mentioned by Imam Mālik, that strength or weakness is not necessarily a question of numbers but of power, state of readiness and equipment. To relate the purport of this passage to warfare in a different time and place, one would surely need to depart from the particularities of the text and highlight instead its general purpose. It is concern for literalism at the expense of empiricism that has led many a devout Muslim to insist on adhering to the letter of the *hadith*, for instance, in the giving of foodgrains in *zakāt al-fitr* (charity given on the occasion of 'Id, marking the end of Ramaḍān). The text has admittedly not mentioned that the monetary equivalent of a staple grain may also be given on this occasion. The ruling of the *hadith* was obviously suitable for its own time, bearing in mind the uncertainty of food supplies in the market place of Medina, but that situation has evidently changed. Al-'Alwānī has written of his personal experience, in this connection, when he addressed a gathering and said that *zakāt al-fitr* may, under contemporary conditions, be paid in its cash equivalent in accordance with today's living standards. He then writes: 'My explanation made some people extremely angry and one *faqīh* came the next day to the mosque with quantities of barley and corn and a measuring cup and started giving out to people in an effort to prove that you can literally implement the Prophet's instructions today.'²¹

The beginning of the fasting month of Ramaḍān is signified, as the Qur'an provides, by the sighting of the new moon. This was, of course, the most reliable method that could be achieved in the early

days of Islam. But the sighting of the new moon with the naked eye would seem to be unnecessary if the beginning and end of Ramaḍān could be established with the aid of scientific methods. To insist, therefore, on a literal enforcement of the text while turning a blind eye to new technological means would not only amount to hardship (*haraḡ*), under certain circumstances at least, but would also defy the essence of Qur'anic teaching on rational enquiry and empirical truth. 'It is just not possible today' as al-'Alwānī rightly observes 'to impose proposals and ideas put forward in Medina by Imam Mālik and his contemporaries fourteen hundred years ago'.²² To ignore subsequent developments in human sciences, modern commerce and economics is likely to result in poverty and hardship and would therefore contravene the general objectives of the Qur'an and *Sunnah*.

Ignoring the role of time-space in the understanding of the Qur'an has also encouraged a certain tendency toward fragmentation and neglect of the internal structure of its values. To say, for example, that the verse of the sword 'And wage war on all the idolaters as they wage war on all of you' (al-Tawbah, 9:36)

وقاتلوا المشركين كافة كما يقاتلونكم كافة

has abrogated the Qur'anic address that validates peaceful relations with non-Muslims 'who fight you not for [your] faith nor drive you out of your home' (al-Mumtāḥinah, 60:8)

الذين لم يقاتلوكم في الدين ولم يخرجوكم من دياركم

is not only neglectful of the time-space factor, but totally unwarranted. The claim does not end with this, but goes on to maintain that the verse of the sword has abrogated over one hundred verses in the Qur'an which advocated a wide range of moral values including mercy, forgiveness, peace, fair treatment and tolerance towards non-Muslims. To invoke *naskh* in such terms might have served a purpose at a time when Muslims were the dominant military and political power on earth, but such an approach, questionable as it was, could hardly be said to be acceptable under a totally different set of circumstances today.

III. *Uṣūl al-Fiqh* Revisited

Our main concern here is to propose an alternative scheme that can inject pragmatism into the fabric of an otherwise theoretical discipline

that cannot effectively relate to the realities of law and government in modern times. The alternative that is proposed must seek to strike a balance between the need for continuity and preservation of a valuable heritage and a determined and purposeful move in order to change the existing impasse regarding *uṣūl al-fiqh*.

There are two areas where improvements could be made in conventional *uṣūl al-fiqh*. We note, on the one hand, that the methodology of *uṣūl* has not integrated the Qur'ānic principle of consultation into its doctrines and procedures. The second shortcoming of *uṣūl al-fiqh*, not unrelated to the first, is its detachment from the practicalities of government, and its near-total reliance on private *ijtihād* by individual jurists. Here we note once again that the Qur'ānic dictum of obedience to those who are in charge of community affairs, the *ūlū al-amr*, has not received due attention in the conventional legal theory. Despite the unmistakable reference of the *ūlū al-amr* to government, jurists and commentators have tended to ignore this and have instead considered the '*ulamā*' to be the principal or even the only frame of reference in the understanding of this term. The '*ulamā*' of *uṣūl* were obviously content with a somewhat one-sided interpretation of the Qur'ān in that the theory they developed was such that it could, from beginning to end, be operated by the '*ulamā*' without the involvement of the government in power and in total isolation from it. This aspect of legal theory is conspicuous in the conventional expositions of *ijmā*, which is defined as 'the unanimous agreement of the *mujtahidūn* of the Muslim community at any period of time following the demise of the Prophet Muḥammad on any matter.'²³

It is remarkable that the definition of *ijmā* is oblivious of both of the Qur'ānic concepts of *shūrā* and *ūlū al-amr*, especially in reference to the government and the role it might reasonably be expected to play in consultation and in taking charge of community affairs. *Ijmā* was defined so that the '*ulamā*' could in theory conclude it and make it binding on the government without either consulting or seeking the consent of government authorities. We are aware, on the other hand, that *ijmā* represents the single most important concept in the legal theory of *uṣūl*, which offers the potential of making the whole of the legal theory pragmatic and viable. *Ijmā* should naturally involve consultation among the broad spectrum of the *ūlū al-amr*, and ensure collective decision-making through participation and involvement of both the government and the '*ulamā*' and of virtually everyone who can contribute to its objectives.

Jamāl al-Dīn 'Atiyyah has suggested a new scheme for con-

ventional *uṣūl al-fiqh* in which he proposes to divide the sources of *Sharī'ah* into the five main headings of: (1) the transmitted proofs, which include the Qur'ān, *Sunnah* and revealed laws preceding the *Sharī'ah* of Islam; (2) ordinances of the *ūlū al-amr*, which includes *ijmā* and *ijtihād*; (3) the existing conditions or *status quo*, insofar as it is harmonious with the preceding two categories, and this includes custom ('*urf*) and the presumption of continuity (*istishāb*); (4) rationality ('*aql*) in areas where full juridical *ijtihād* may not be necessary (the day-to-day rulings of government departments, for example, that seek to ensure good management of affairs may be based on rationality alone); (5) original absence of liability (*al-barā'ah al-aqliyyah*), which presumes permissibility and freedom from liability as the basic norm of *Sharī'ah* in respect of things, acts and transactions that have not been expressly prohibited.²⁴

The broad outline of this scheme is acceptable, notwithstanding certain reservations that I shall presently explain. 'Atiyyah has himself stated that the scheme he has proposed, especially in its reference to the transmitted proofs, relies almost totally on conventional *uṣūl al-fiqh*. In the second heading, 'Atiyyah's scheme proposes a revised structure for *ijmā* and *ijtihād*. These are undoubtedly among the most important themes of the methodology of *uṣūl al-fiqh*, and bringing them both under the umbrella of the ordinances of *ūlū al-amr* offers the advantage of linking this classification directly to the Qur'ān, on the one hand, and taking an affirmative stance on government participation in the conclusion of *ijtihād* and *ijmā* on the other. I shall presently return to 'Atiyyah's views, but here I note a relevant observation from Hasan Turābī who states that the decline of *ijtihād* was partly due to the decline in *shūrā* and then proposes that the state and the *ūlū al-amr* should take every step to make *shūrā* an integral part of decision-making processes. The public and the media can also play a role in stimulating participation, consultation and debate until a consensus emerges and the majority makes its voice known. Turābī adds that 'decisions which are made through *shūrā* are then ratified by the *ūlū al-amr* and implemented as juridical *ijmā* [*ijmā' tashrī'ī*] or the ordinances of government [*amr hukumī*].'²⁵

The third heading in 'Atiyyah's proposed scheme consolidates under one category the two recognised proofs of *uṣūl al-fiqh*, namely, *istishāb* and custom, and tends to attach to it a degree of prominence that they were not given in their conventional expositions. A mere difference of emphasis in the scholastic doctrines of the *madhāhib*, such as the Ḥanafī and Shāfi'ī emphasis on custom and *istishāb*

respectively, is not enough to underscore the importance of social custom in the development of *Shari'ah*. 'Atiyyah's treatment of custom and *istiḥāb* consolidates these two logically related themes, gives them greater prominence, and thereby tries to inject pragmatism into the rubric of the legal theory.

I have hitherto commented on the first three parts of 'Atiyyah's five-point scheme and I am of the view that the remaining two headings in that scheme, namely rationality, and original non-liability, are superfluous and should therefore be omitted. This means that we would have consolidated the entire range of topics in conventional *uṣūl al-fiqh* under the three headings of transmitted proofs, the ordinances of *ūlū al-amr* and valid *status quo*. The second of these, namely, the ordinances of *ūlū al-amr*, is comprehensive, bearing in mind that the broad concept of *ijtihād* subsumes a whole range of topics such as *qiyās*, *istiḥsān*, *sadd al-dharā'i'*, which, however, featured somewhat atomistically in conventional *uṣūl al-fiqh*, each as a separate chapter rather than an integrated theme of a unified whole. This list of *ijtihād*-related topics could, of course, be extended to *istiḥāb* which may be seen as another sub-variety of *ijtihād*, and yet it is justified to treat *istiḥāb*, or presumption of continuity, under the valid *status quo* in the proposed scheme. For *istiḥāb* is grounded in the idea of presuming the continued validity of existing facts and situations unless there is evidence to suggest otherwise. Even if we include *istiḥāb* under the general concept of *ijtihād*, it would only come, as per conventional legal theory, at the very end of the list of rational proofs, as it is generally regarded to be the weakest of all proofs, which is why it is known in the conventional *uṣūl* as the last ground of *fatwā* (*ākhir madār al-fatwā*). To classify *istiḥāb* under valid *status quo* would thus appear to be acceptable, as it is not likely to feature prominently under the category of *ijtihād* and *ijmā'*, and it seems more coherent to classify it under one heading with custom (*'urf*).

There is one topic in the conventional proofs of *uṣūl al-fiqh* which 'Atiyyah has not mentioned, namely, the *fatwā* of a Companion. Notwithstanding some disagreement on its authority as a proof, I propose that the *fatwā* of a Companion should be included in the main category of transmitted proofs, for we may otherwise find no place in the legal theory for the outstanding contributions of Companions like 'Umar ibn al-Khaṭṭāb, 'Abd Allāh ibn Mas'ūd and many others. Most of the important rulings of the leading Companions were perhaps eventually adopted under the broad concept of *ijmā'*, yet there remains a fairly rich legacy of rulings on which they have recorded different

opinions and interpretations and these may be included under the broad category of transmitted, yet only persuasive rather than binding, proofs of *Shari'ah*.

As I stated earlier, the remaining two categories in 'Atiyyah's proposed scheme, namely, rationality (*'aql*) and original non-liability (*barā'ah al-aqliyyah*), seem somewhat unnecessary and controversial, for they add but little to its preceding three categories. We note, for example, that rationality could be subsumed under the broad concept of *ijtihād* or under any of its sub-varieties such as analogy, juristic preference and *maṣlaḥah*. These are all rationalist doctrines and if we were to open a separate category for rationality, it would be difficult to decide where to place such other concepts as *maṣlaḥah* and *istiḥsān*, under rationality or *ijtihād*. Furthermore, creating a new category of proof in the name of *'aql* is bound to raise questions as to the nature of the relationship between revelation and reason. Opening a new chapter under *'aql* can only be justified if 'Atiyyah had clearly articulated the respective roles of *'aql* and *wahy*, which he has not. Since the broad outline of 'Atiyyah's proposed scheme is in conformity with the basic order of priorities that are upheld in conventional *uṣūl al-fiqh*, opening a new chapter in the name of rationality would not only interfere with the other parts of the proposed scheme, but is also inherently ambiguous and unjustified.

As for the proposed recognition of *al-barā'ah al-aqliyyah* as a source or proof of *Shari'ah*, it will be noted once again that this is subsumed, in conventional *uṣūl al-fiqh*, under the presumption of continuity, or *istiḥāb*, and it is as such a presumption, not a proof. Original non-liability presumes in reference, for example, to the accusation of crime that the accused person is innocent, or in reference to civil litigation, that there is no liability, unless the contrary is proven in each case.

Istiḥāb in this context presumes the normal or original state of things, that is non-liability, which should prevail unless there is evidence to suggest otherwise. Since this is only a presumption, it is a weak ground for decision-making and it does not, in any case, present a case for it to be recognised as a source or proof of *Shari'ah* in its own right. I therefore propose that this too should be subsumed under the third heading of 'Atiyyah's proposed scheme, namely, the valid *status quo*. I have in sum proposed a consolidation of 'Atiyyah's five-point scheme into three and submitted that the remaining two headings are somewhat repetitive and need not be included.

NOTES

1. 'Alwānī, 'The Crisis of *Fiqh*', p. 132.
2. Cf. *Al-Mawānī al-Fiqhiyyah*, I, 18.
3. Cf. Abū Zahrah, *Uṣūl*, pp. 8ff.
4. Cf. Ansari, 'The Significance of Shāfi'ī's', 485.
5. Aziz al-Azmeh, 'Islam Legal Theory and the Appropriation of Reality' in Aziz al-Azmeh, ed., *Islamic Law*, p. 251.
6. Cf. Turābī, *Tajdīd*, p. 13.
7. Abu Sulayman, *The Islamic Theory of International Relations*, p. 77.
8. *Ibid.*, p. 83.
9. *Ibid.*, p. 84.
10. 'Alwānī, *Ijtihād*, p. 10.
11. *Ibid.*, p. 16.
12. *Ibid.*, p. 18.
13. Cf. Iqbal, *Reconstruction*, p. 147.
14. Cf. Shāṭibī, *Muwāfaqāt*, III, 244; Ahmad Amin, *Fajr al-Ilām*, p. 211.
15. The number of daily prayers, for example, was initially fixed at two, but was later increased to five, and the initially charitable and undefined character of *zakaṭ* in the Meccan period was later given the force and precision of positive law. For more examples see Shāṭibī, *Muwāfaqāt*, III, 63; Badrān, *Uṣūl*, p. 148.
16. 'Alwānī, *The Qur'ān and the Sunnah*, p. 36.
17. *Ibid.*
18. Cf. Abu Sulayman, *Islamic Methodology*, p. 34.
19. *Ibid.*, p. 70.
20. *Ibid.*, pp. 72ff.
21. Cf. 'Alwānī, *Ijtihād*, p. 26.
22. *Ibid.*, p. 26.
23. Cf. Āmidī, *Ikām*, I, 96; Shawkānī, *Ishād*, p. 71.
24. 'Atīyyah, *Nazarīyyah*, pp. 189ff.
25. Turābī, *Tajdīd*, p. 30.

Conclusion

The preceding chapter highlighted the close relationship between the textual sources of *Sharī'ah* and the methodology of *uṣūl al-fiqh*. This was followed by comments on literalism versus empiricism in the legal theory of *uṣūl* and how the reformist trend now looks to the *maqāṣid al-Sharī'ah*, that is, the objectives of *Sharī'ah*, in order to make up for some of the weaknesses of the conventional methodology of *uṣūl al-fiqh*. The present chapter attempts to take some of these points to their logical conclusion and takes a closer look at the relationship of the *maqāṣid* with the *uṣūl*.

One of the main objectives of *uṣūl al-fiqh* is to provide a set of guidelines to ensure that *ra'y* plays a supportive role to the values of *waḥy*. This is true of all the familiar doctrines of *uṣūl al-fiqh* which seek, each in their individual capacity, to utilise the source evidence of the Qur'ān and *Sunnah* and extend their message to a variety of different situations. The inner dynamics of the Qur'ān and *Sunnah* can be visualised in their emphasis on justice, equality and truth, on commanding good and forbidding evil, on the promotion of benefit and prevention of harm, on charity and compassion, on fraternity and co-operation among the tribes and nations of the world, on consultation and government under the rule of law, and so forth. This is clearly not a static agenda and it is broad enough to provide scope for perpetual refinement. If we see the *Sharī'ah* in the light of these objectives, then *uṣūl al-fiqh* provide us with procedural devices and formulae for their realisation.

It is equally evident that the methodology of *uṣūl al-fiqh* would have little meaning and purpose if the *Sharī'ah* were meant to be a fixed and unchangeable entity. *Uṣūl al-fiqh* is predicated on the idea of development and growth, and functions as a vehicle of accommodation and compromise between the normative values of *Sharī'ah* and the practicalities of social change. *Uṣūl al-fiqh* translates this

basic outlook into workable formulae that often aim to establish an equilibrium of values. To speak of *istiṣlāḥ*, or considerations of public interest, for example, is to articulate an acceptable formula that strikes a balance between diverging, even conflicting, interests of continuity and change, of those of the individual and society, of freedom and responsibility, of moral virtue and materialist gain, and so forth. It is therefore neither the change as such, nor continuity alone, nor any of these other values we have mentioned that could be said to be, in an exclusive and absolute sense, the valid objective of *uṣūl al-fiqh*. It is rather the manner of reconciling these and achieving a balanced accommodation and equilibrium that often constitutes the valid objective of the methodology of *uṣūl al-fiqh*.

The persistent quest that we observe, in almost every chapter of *uṣūl al-fiqh* for textual proof of particular doctrines, and for conditions to attend their valid application, that the purpose of all this is to ensure conformity with the dictates of *wahy*. Be it *ijmāʿ* or *qiyās* or any other doctrine, two sets of questions are usually raised, one of which seeks to ascertain the evidential basis, or *hujjiyyah*, of that doctrine in the textual sources, and the other seeks to identify the proper conditions that would ensure a controlled and methodical application of the formula in question. Both of these requirements are predicated on the desire that rationalist doctrines are applied within the given value structure of the Qurʾān and *Sunnah*.

On a similar note, to stipulate that *maṣlaḥah* or *istiḥṣān* is a proof only when it is not in conflict with a clear text is obviously to preclude from the ambit of *uṣūl al-fiqh* a formula or a method that is alien to the textually approved values.

But then to read among the conditions of *qiyās*, *ijmāʿ*, *istiḥṣān*, etc., that these formulae can only be invoked in the absence of a clear ruling in the textual sources over the issue at hand is another way of saying that these methodological formulae are basically designed to address new situations and to find solutions to unprecedented issues. This also means that *uṣūl al-fiqh* is the methodology of accommodating social change within the given value framework of Islam. Neither *uṣūl al-fiqh* nor *ijtihād* would fulfil their desired objectives if they did not entertain novel situations and the idea of developing the law in the light of the changing needs of society.

The onset of literalism and regimentation in the juristic tradition of Islam evidently marked a departure from the more versatile and pragmatic outlook that is upheld in the sources of *Sharīʿah* and the precedent of the leading Companions. Instead of perceiving the

words of a given text as the carrier and vehicle of a certain value, the advocates of literalism began to pay more attention to the words of the text at the expense, sometimes, of its purpose, which often amounted to a neglect of prevailing reality and empirical truth. To insist on the actual sighting of the moon in order to ascertain the beginning or end of Ramaḍān, for example, and to say that only the actual foodgrains or livestock and not its monetary value is payable in *zakāh*, amounts to a kind of empty literalism that can hardly be sustained by a comprehensive reading of the text. Instead of taking a holistic approach to the reading of the text, literalism began to alienate the language of the text from the broader objectives of *Sharīʿah*. Being the main ally of *taqlīd*, literalism tended to dominate, in varying degrees and contexts the sciences of *tafsīr*, *fiqh* and *ḥadīth* and had serious repercussions for *ijtihād*.

There is now a renewed emphasis on the goals and objectives of *Sharīʿah*, the *maqāṣid al-sharīʿah*, with the express purpose of departing from the strictures of literalism in the direction of a goal-oriented and comprehensive understanding of the text. This shift of emphasis is obviously designed to restore the balance between the letter and spirit of the text that was once present in the early phases of the development of *uṣūl*, but was subsequently disturbed and remained in a state of disequilibrium throughout the centuries of *taqlīd*. *Uṣūl al-fiqh* provided an effective mechanism for *ijtihād* during the early period but became increasingly weak until both *ijtihād* and *uṣūl al-fiqh* came to a standstill. *Uṣūl al-fiqh* changed direction and its resources began to be utilised in the service of conformity and *taqlīd*. Imitation substituted originality, and literalism offered a comforting escape from the unpalatable reality of alienation that the 'ulamā' experienced as a result of strained relations with the ruling authorities.

The fresh emphasis on the *maqāṣid* that we are now witnessing is evidently a step in the direction of opening up the outlook and horizon of *uṣūl al-fiqh* and releasing it from the rigidities of literalism and imitation, but it does not signify a move, as it were, to abandon *uṣūl al-fiqh* altogether. The new emphasis on the *maqāṣid* may be the harbinger of a series of detailed changes in the various parts of *uṣūl al-fiqh* as the reformist movement gains greater momentum and support. The new trend is also indicative of the desire to rejuvenate *ijtihād*, for the revival of *ijtihād* still remains a largely unfulfilled objective, even after almost a century since the days of al-Afghānī and 'Abduh, whose clarion call for the revival of *ijtihād* and a return to the sources of Islam turned a new page in the history of this movement. The

Islamic resurgence of the 1970s and 1980s has hitherto mainly consisted of a demand in which the Muslim masses have expressed dissatisfaction over the alienation of their heritage, and domination of Western institutions in their societies. This demand has yet to be translated into specific formulae for reform.

A revised and reformed *uṣūl al-fiqh* has been the focus of attention in recent decades in the activities, not only of the American-based International Institute of Islamic Thought, but of frequent seminars and conferences by institutions of higher learning in the Muslim world. One of the clear messages has been to underscore the stifling effects of literalism and imitation and invite attention to the higher objectives, or the *maqāṣid*, of *Sharī'ah*. The advocates of reform have warned against the temptation of reading the *uṣūl* for its own sake, and stressed the need to see the *uṣūl al-fiqh* in its original light, which is to stimulate *ijtihād* and provide a vehicle for its proper implementation.

To this I might add a reminder of the temptation of moving to the other extreme and to think that the *maqāṣid* could by themselves satisfy the reformist demand without the aid of the methodological tools of *uṣūl al-fiqh*. For the *maqāṣid* of *Sharī'ah* are nothing other than a statement of the goals and objectives of *Sharī'ah*, such as *maṣlahah*, justice, and protection of a set of values including religion, life, intellect, family and property. Important as they undoubtedly are, the *maqāṣid* of *Sharī'ah* do not provide a methodology or operational formulae of their own, that is, independently of *uṣūl al-fiqh*. The conventional *uṣūl* is, on the other hand, rich with methodology and procedural directives for *ijtihād*. Hence a substantive merger between the *uṣūl* and the *maqāṣid* will prove naturally complementary and appealing. An open-ended pursuit of the *maqāṣid* could give rise to the kind of controversy that history has witnessed between the *Ahl al-Ra'y* and *Ahl al-Hadith*. To pay attention to the *maqāṣid* is otherwise more than warranted as it marks a new beginning for a goal-oriented methodology and opens up the horizons of *ijtihād*.

Thanks to the strictures of literalism, conventional *uṣūl* has not achieved a balanced fusion between the letter and the spirit of *Sharī'ah*. The '*ulamā'*' of *uṣūl* did not pay individual attention to the *maqāṣid* and tended to subsume them in their study of such other themes as ratiocination (*ta'lit*), that is identification of the effective cause ('*illah*), *hikmah* (rationale and philosophy) of the law, and also, of course, *qiyās* and *maṣlahah*, the last of which is in itself one of the recognised *maqāṣid*. There were also differences of orientation to these ideas among the *madhāhib*, some of which viewed '*illah*, *hikmah* and *maṣlahah*

more technically than others. Broadly speaking, however, the *maqāṣid al-Sharī'ah* as a distinctive chapter and discipline of *Sharī'ah* only received exclusive attention in the works of al-Shāṭibī in the eighth century Hijrah, that is, almost five centuries after the development of the science of *uṣūl al-fiqh*.

Six more centuries have elapsed since the days of al-Shāṭibī and it is only now that we note a decisive trend toward substantive integration of the *maqāṣid* within the fabric of *uṣūl al-fiqh*. The effort now to give greater prominence to the *maqāṣid* should enable us to discard a ruling, say, of *qiyās* or of *fatwā* and *ijtihād*, if it is in disharmony with the overriding goals of *Sharī'ah*, even if it appears to be technically sound and in conformity with prescribed procedures. This would mean that the rulings of *ijtihād* are made subservient to the higher objectives of the law and are consequently abandoned in the event of conflict with them.

The fact that we now propose to entrust the Muslim representative assembly and *ulī al-amr* with the role of being the main repository of *ijtihād* and *ijmā'* is itself a move in the direction of the *maqāṣid*. This would be one of the most important steps, and would remove the conventional duality between the *Sharī'ah* and statutory law, and hopefully bring coherence to law and government in Muslim societies. Although this is not a new subject and we know the emphasis that is laid in the textual sources of Islam on the unity and integration of the *ummah*, yet no one has, to the best of my knowledge, discussed this in conjunction with the *maqāṣid* of *Sharī'ah*. Despite the emphatic tone of the Qur'an and *hadith* on unity and solidarity, it is somewhat disillusioning to find that Muslim history is dominated by duality and separation. Bifurcation and duality in legal practice and education has become even more pronounced in the present age. To split the Muslim community between the two opposing camps of '*ulamā'*' and *umara'*, or between the *Sharī'ah* and secular/statutory law, is one of the obvious instances of the neglect of the *maqāṣid* of *Sharī'ah* and the spirit of unity in the *ummah*. This also goes to show that the *maqāṣid*, like the *uṣūl*, are changeable – in line, that is, with the circumstances of society and time. The welfare state, economic development and scientific research, to name but a few, are some of the new themes that should perhaps be added to the list of the *maqāṣid*. The conventional identification of the essential *maqāṣid* into five or six headings is evidently not enough and should be revised and supplemented in conformity with new developments and demands of the contemporary age.

Some of the imbalances we have discussed concerning *uṣūl al-fiqh*

in general, and its various doctrines in particular, are evidently related to the alienation of 'ulamā' and government and the exclusion largely of the former from the latter. The emerging gap between the theory and practice of *uṣūl al-fiqh* was subsequently endorsed, in modern times, by the prevalence of statutory legislation, which has largely replaced *ijtihād*, and has become a component part and instrument of the nation-state. *Ijtihād* and *ijmā'*, which were the main instruments of legislation in conventional *uṣūl al-fiqh* no longer play the same role in statutory legislation and have been marginalised as a result. There is now a tension between the proposed methodology of *uṣūl* and the prevailing model of statutory legislation. But even so, the tension that we note here still falls short of total alienation between the *Shari'ah* and modern law. For if we were to see *ijtihād* as a methodology of research, and *ijmā'* as legislation by consensus, then neither of these are totally alien to modern legislative processes.

A great deal of statutory legislation that is in place in almost every Muslim country can in a substantive sense be subsumed under one or the other of the existing doctrines of *uṣūl al-fiqh*, be it *maṣlahah*, or *istiḥṣān* or *istiḥṣāb*, or the general principles and guidelines of the Qur'an and *Sunnah*. But since there is no recognised procedure under the prevailing constitutions to utilise the methodology and resources of *uṣūl al-fiqh*, the continuity and relevance of that heritage has become increasingly uncertain. Unless there is adjustment on both sides, a certain opening up, that is, of the constitutional processes, on the one hand, and reform in some of the substantive doctrines of *uṣūl al-fiqh* on the other, the desired solutions to the problem of the alienation of *uṣūl al-fiqh* and its integration into the fabric of modern government are not likely to materialise.

We have also seen evidence, throughout the decades of Islamic revivalism and its aftermath in the latter part of this century, that Muslim communities and leaders have become increasingly aware of the need to establish closer links with their own heritage. Greater awareness along these lines will make the utility and relevance of *uṣūl al-fiqh* to the legislative processes of government increasingly obvious.

As I have elaborated in a previous chapter on *ijmā'*, much can be done to bridge the gap between the theory and practice of *uṣūl al-fiqh* if we can integrate *ijtihād* and *ijmā'* into the working of the Muslim legislative assembly and *ulū al-amr*. To merge *ijmā'* and *ijtihād* into a collective and consultative endeavour will hopefully contribute to a more balanced perspective on legal construction and a move away

from the dry literalism that was driven by an underlayer of tension between the 'ulamā' and government.

The departure from a literalist to a goal-oriented jurisprudence is also expected to inject a greater degree of empiricism and flexibility into it that will help to bring the law closer to social reality. The observed reality needs, therefore, to be translated into the wider logic and rationale of the textual injunctions of the Qur'an and *Sunnah*; for the Qur'an (and the *Sunnah*) has itself unfolded its message in response to, and in contemplation of, the then prevailing conditions of Arabian society. The attending reality was often taken as a springboard and starting point for building a vision of the future. The frequent Qur'anic invitation to rational enquiry, observation and investigation, attention to the laws of causation, learning from the lessons of history and the experiences of by-gone nations, attention to real-life events, the *asbāb al-nuzūl* and the realism that is evident in the graduality (*tanjīm*, *tadarruj*) of the revelation of the Qur'an over a period of time should, all in all, have been enough to give *uṣūl al-fiqh* a strong, even indelible, grounding in empiricism. But this dimension of the original teachings of the Qur'an, and the pragmatism that is so characteristic of the *Sunnah* of the Prophet and his Companions, was neglected in the subsequent development of Islamic jurisprudence.

The change of direction that subsequently took place as a result of the tenacious hold of *taqlid* made the *Shari'ah* increasingly detached from the realities of life in the community. *Ijtihād*, which was essentially designed to keep the law abreast with the changing conditions of society and reflect the realities of time-space into the fabric of the law, was subjected to severe restrictions and this resulted in its eventual decline. Even the most characteristically empirical doctrines of *uṣūl al-fiqh*, such as custom (*'urf*), presumption of continuity (*istiḥṣāb*) and *maṣlahah*, failed to serve the purpose for which they were originally designed. They were given a low profile to begin with, and were eventually marginalised vis-à-vis the rising tides of literalism. Instead of becoming an ardent observer of social reality and change, and devising adequate responses for them, the Muslim jurist of the era of *taqlid* often denounced social change in the name of aberration from normative guidance, became increasingly dogmatic and gave non-*ijtihādī* responses to issues that required initiative and bold responses along the lines of *ijtihād*. The centuries of *taqlid* that followed led to the widening of the gap between the theory and practice of *uṣūl*, so much so that it was no longer capable of responding to the more accelerated pace of change that was stimulated by advances in industry, technology and science.

To acknowledge change as we observe it and respond to it is one aspect of empiricism that is of concern mainly to *ijtihād* on the detailed issues of *fiqh*. Another aspect of empiricism is to see the methodology of *uṣūl al-fiqh* itself as liable to adjustment, development and change. Many of the doctrines of *uṣūl* are themselves a product of *ijtihād*, some of which have been supported by *ijmā'*; but most are subject to a disagreement among the *madhāhib*. The methods that are so proposed should naturally be changeable in line with observation and empirical reality. If our experience at the end of the 20th century shows, for example, that our concept of *ijtihād* should be changed so as to embrace the widely observed phenomenon of statutory legislation, or the procedure for *ijmā'* and *qiyās* should be revised and changed in line with prevailing conditions, then this should be acceded, and a refusal to do so will be contrary to empirical truth. If we arrive, on the other hand, at the conclusion that a new method or procedure will be more suitable to accommodate unprecedented developments, then one should equally be open to the idea of adding new methods and new chapters to *uṣūl al-fiqh*. In the same way, one should also be open to the prospects of discarding certain parts, or existing elements, of *uṣūl al-fiqh* which no longer serve a useful purpose, provided that the endeavour is still in keeping with the correct guidelines of *ijtihād*.

In sum, this book is for the most part devoted to an exposition of the science of *uṣūl al-fiqh* as it is found in its reliable sources. I have also taken the opportunity to convey an awareness, especially in the present edition, of the problematics of *uṣūl al-fiqh* that have become the subject of deliberation and debate in recent times. Issues relating to the individual doctrines of *uṣūl* have been addressed in the relevant parts of this book as and when chosen doctrines are discussed. I have made suggestions for possible adjustments, and discussed reform proposals that Muslim scholars have advanced in recent times. The proposals I have discussed generally look to the ways and means by which the individual doctrines of *uṣūl al-fiqh* can be utilised in the legislative and judicial processes of contemporary government.

The last chapter in this book expounded a new scheme for *uṣūl al-fiqh* and suggested a reorganisation of its methodology with a view to enhancing internal coherence and consolidation in this discipline. The revised scheme of *uṣūl al-fiqh* is also hoped to bridge the gap that has developed between *Shari'ah* and statutory law, and ultimately to achieve a substantive integration between them. This will, in all probability, involve a gradual process of preparation that might

culminate in constitutional reform; but once achieved, it will equip the Muslim legislature with a diverse and resourceful methodology, and place the Muslim government in a position to expect greater public support for its programmes.

The proposed new scheme for *uṣūl al-fiqh* promises to go a long way to overcome the shortcomings of conventional legal theory, especially in relationship to *ijtihād* and *ijmā'*, the two most versatile and yet dormant doctrines of *uṣūl* that have yet to be utilised as instruments of legislative consolidation and reform. The new scheme proposes to subsume them both under the ordinances of the *ulū al-amr*, a Qur'anic formula that combines authority with consultation, the expertise of the leading '*ulamā'*' with that of the scholars in other disciplines, and encourage participation, originality and consensus within the fabric of a lawfully-elected government. This scheme combines the interests of both continuity and change in a revised, yet essentially unchanged, *uṣūl al-fiqh*, and takes it to its logical conclusion.

Glossary

- ⁶*adl*: justice, upright and just.
⁷*adālah*: justice, uprightness of character.
adillāh (pl. of *dalīl*): proofs, evidences, indications.
āḥād: solitary *ḥadīth*, report by a single person or by odd individuals.
ahkām (pl. of *ḥukm*): laws, values and ordinances.
ahliyyah: legal capacity.
ahliyyah al-adā': active legal capacity that can incur rights as well as obligations.
ahliyyah al-wujūb: receptive legal capacity which is good for receiving but cannot incur obligations.
⁸*amal*: act, practice, precedent.
⁹*ām*: general, unspecified.
amr (pl. *awāmīr*, *umūr*): command, matter, affair.
¹⁰*aql*: intellect, rationality, reason.
arkān (pl. of *rukn*): pillars, essential requirements.
asl: root, origin, source.
athar: lit. impact, trace, vestige; also deeds and precedents of the Companions of the Prophet.
āyah (pl. *āyāt*): lit. sign, indication; a section of the Qur'ānic text often referred to as a 'verse'.
¹¹*azimah*: strict or unmodified law which remains in its original rigour due to the absence of mitigating factors.
bāṭil: null and void.
bayān: explanation, clarification.
dalālah: meaning, implication.
dalālah al-naṣṣ: inferred or implied meaning of a given text.
dalīl: proof, indication, evidence.
faqīh (pl. *fuqahā*): jurist, one who is learned in *fiqh*.
far': lit. a branch or a sub-division, and (in the context of *qiyās*) a new

- case.
farḍ: obligatory, obligation.
farḍ 'ayn: personal obligation.
farḍ kafa'i: collective obligation.
fāsid: corrupt, void; deficient (as opposed to *bāṭil*, which is null and void).
furū' (pl. of *far'*): branches or subsidiaries, such as in *furū' al-fiqh*, that is, the 'branches of *fiqh*', as opposed to its roots and sources (*uṣūl al-fiqh*).
ḥadd (pl. *ḥudūd*): lit. limit, prescribed penalty.
ḥādīth: narratives and reports of the deeds and sayings of the Prophet.
ḥajj: the once-in-a-lifetime obligation of pilgrimage to the holy Ka'bah.
ḥaqīqī: real, original, literal (as opposed to metaphorical).
ḥaqq Allāh: right of God, or public right.
ḥaqq al-'abd (also *ḥaqq al-ādami*): right of man, or private right.
ḥijrah: the Prophet's migration from Mecca to Medina, signifying the beginning of the Islamic calendar.
ḥirābah: highway robbery.
ḥisbah: lit. computation or checking, but commonly used in reference to what is known as *amr bi'l-ma'rūf wa-nahy 'an al-munkar*, that is, 'promotion of good and prevention of evil'.
ḥujjiyyah: producing the necessary proof/authority to validate a rule or concept.
ḥukm (pl. *ahkām*) as in *ḥukm shar'i*: law, value, or ruling of *Shar'i ah*.
al-hukm al-taklīfī: defining law, law that defines rights and obligations.
al-hukm al-waḍ'ī: declaratory law, that is, law which regulates the proper implementation of *al-hukm al-taklīfī*, such as by expounding the conditions, exceptions and qualifications thereof.
¹²*ibārah al-naṣṣ*: explicit meaning of a given text which is borne out by its words.
¹³*iddah*: the waiting period following dissolution of marriage by death or divorce.
iffār: breaking the fast.
ijmā': consensus of opinion.
ijtihād: lit. 'exertion', and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from its sources.
ikhtilāf: juristic disagreement.
¹⁴*illah*: effective cause, or *ratio legis*, of a particular ruling.
iqṭidā' al-naṣṣ: the required meaning of a given text.

ishārah al-naṣṣ: an alluded meaning that can be detected in a given text.
ʿismah: infallibility, immunity from making errors.

istiḥsān: to deem something good, juristic preference.

istiḥṣāb: presumption of continuity, or presuming continuation of the status *quo ante*.

istiṣlāḥ: consideration of public interest.

istinbāṭ: inference, deducing a somewhat hidden meaning from a given text.

jihād: holy struggle.

jumhūr: dominant majority.

kaffārāh (pl. *kaffārāt*): penance, expiation.

kalām: lit. speech, but often used as abbreviation for *ʿilm al-kalām*, that is, 'theology' and dogmatics.

karāḥah (or *karāhiyyah*): abhorrence, abomination.

khabar: news, report; also a synonym for *ḥadīth*.

khaṭf: hidden, obscure; also refers to a category of unclear words.

khaṣṣ: specific, a word or a text which conveys a specific meaning.

al-khulafāʾ al-rāshidūn: the Rightly-Guided Caliphs; the first four Caliphs of Islam.

kitābiyah: female follower of a non-Islamic revelation.

madhhab (pl. *madhāhib*): juristic/theological school.

maḥqūd: a missing person of unknown whereabouts.

maḥlūm al-mukhālafah: divergent meaning, an interpretation that diverges from the obvious meaning of a given text.

majāzī: metaphorical, figurative.

makrūh: abominable, reprehensible.

mandūb: commendable.

mānīʿ: hindrance, obstacle.

mansūkh: abrogated, repealed.

maqāṣid: (pl. of *maqṣūd*): goals and objectives.

mashhūr: well-known, widespread.

maṣlahah: considerations of public interest.

mauḍūʿ (pl. *mauḍūʿāt*): fabricated, forged.

mubāh: permissible.

mufassar: explained, clarified.

muhārabah: highway robbery.

muhkam: perspicuous, a word or a text conveying a firm and unequivocal meaning.

mujmal: ambivalent, ambiguous, referring to a category of unclear words.

mujtahid (pl. *mujtahidūn*): legist competent to formulate independent tradition based opinions in legal or theological matters.

mukallaf: a competent person who is in full possession of his faculties.

mukhtaṣar: abridgement, summary, esp. of juristic manuals composed for mnemonic and teaching purposes.

munāsib: appropriate, in harmony with the basic purpose of the law.

muḥayyad: confined, qualified.

mursal: 'discontinued' or 'disconnected' *ḥadīth*, esp. at the level of a Companion.

mushkil: difficult; also refers to a category of unclear words.

mushtarak: homonym, a word or phrase imparting more than one meaning.

musnad: *ḥadīth* with a continuous chain of transmitters.

mutashābih: intricate, unintelligible, referring to a word or a text whose meaning is totally unclear.

muṭlaq: absolute, unqualified.

nahy: prohibition.

naqli: transmitted, as e.g., in 'transmitted proofs' which are to be distinguished from 'rational proofs'.

nāsikh: the abrogator, as opposed to the *mansūkh* (abrogated).

naskh: abrogation, repeal.

naṣṣ: a clear injunction, an explicit textual ruling.

nikāh: marriage contract.

nuṣūṣ (pl. of *naṣṣ*): clear textual rulings.

qadhif: slanderous accusation.

qādhif: slanderous accuser.

qāḍī: judge.

qafʿi: definitive, decisive, free of speculative content.

qisās: just retaliation.

rajm: stoning to death.

riwāyah: narration, transmission.

rukḥṣah: concession or concessionary law, that is, law which is modified due to the presence of mitigating factors.

rukn: pillar, essential ingredient.

sabah (pl. *asbāb*): cause, means of obtaining something.

ṣaḥīḥ: valid, authentic.

ṣalāh: obligatory prayers.

sanad: basis, proof, authority.

sharʿ (pl. *shurūf*): condition.

- shūrā*: consultation.
shurb: wine-drinking.
ta'diyah: transferability.
tahliḥ: an intervening marriage contracted for the sole purpose of legalising remarriage between a divorced couple.
tahrim: prohibition, or rendering something into *ḥarām*.
takhsīs: specifying the general.
takhyir: right to choose.
taklif: liability, obligation.
talāq: divorce initiated by the husband.
ta'lil: ratiocination, search for the effective cause of a ruling.
taqiyyah: concealment of one's views to escape persecution.
taqlid: imitation, following the views and opinions of others.
tashrī: legislation.
tawātūr: continuous recurrence, continuous testimony.
ta'wil: allegorical interpretation.
tayammum: ablution with clean sand/earth in the event where no water can be found.
ta'zīr: deterrence, discretionary penalty determined by the *qāḍī*.
tazkiyah: compurgation, testing the reliability of a witness, cross-examination.
thaman: the purchase price.
ūlā al-amr: persons in authority and in charge of community affairs.
ummah: the faith-community of Islam.
uṣūl al-qānūn: modern jurisprudence.
wahy: divine revelation.
wājib: obligatory, often synonymous with *fard*.
wājib 'aynī: personal obligation.
wājib kafa'i: collective obligation of the entire community.
wālī: guardian.
waqf: charitable endowment.
wasf (pl. *awṣāf*): quality, attribute, adjective.
wilāyah (also *walāyah*): authority, guardianship (of minors and lunatics).
wuḍū': ablution with clean water.
wujūb: obligation, rendering something obligatory.
ẓāhir: manifest, apparent.
ẓann: speculation, doubt, conjecture.
ẓannī: speculative, doubtful.
zīnā: adultery, fornication.

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Prof Mohammad Hashim Kamali was Professor of Law at the International Islamic University, Malaysia, where he taught Islamic law and jurisprudence for over twenty years. He is, at present, Chairman of the International Institute of Advanced Islamic Studies (IAIS) Malaysia. Among his other titles are *Principles of Islamic Jurisprudence* and *Islamic Commercial Law*.